No. 14-857

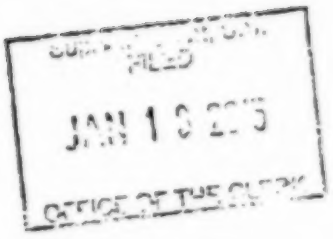
Title:	Campbell-Ewald Company, Petitioner
	v.
	Jose Gomez
Docketed:	January 20, 2015
Linked with 14A598	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(13-55486)
Decision Date:	September 19, 2014

Questions Presented

—Date—	——Proceedings and Orders----------
Dec 5 2014	Application (14A598) to extend the time to file a petition for a writ of certiorari from December 18, 2014 to January 19, 2015, submitted to Justice Kennedy.
Dec 8 2014	Application (14A598) granted by Justice Kennedy extending the time to file until January 19, 2015.
Jan 16 2015	Petition for a writ of certiorari filed. (Response due February 19, 2015)
Feb 10 2015	Order extending time to file response to petition to and including March 23, 2015.
Feb 19 2015	Brief amici curiae of Chamber of Commerce of the United States of America, and Business Roundtable filed.
Mar 23 2015	Brief of respondent Jose Gomez in opposition filed.
Apr 7 2015	Reply of petitioner Campbell-Ewald Company filed.
Apr 8 2015	DISTRIBUTED for Conference of April 24, 2015.
Apr 13 2015	Supplemental brief of respondent Jose Gomez filed. (Distributed)
Apr 14 2015	Response to supplemental brief of respondent from petitioner filed. (Distributed)
Apr 23 2015	Rescheduled.
Apr 27 2015	DISTRIBUTED for Conference of May 1, 2015.
May 4 2015	DISTRIBUTED for Conference of May 14, 2015.
May 18 2015	Petition GRANTED.
Jun 10 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the respondent.
Jun 23 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 16, 2015.
Jun 23 2015	The time to file respondent's brief on the merits is extended to and including August 24, 2015.
Jun 30 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jul 16 2015	Joint appendix filed. (Statement of costs filed)

Jul 16 2015	Brief of petitioner Campbell-Ewald Company filed.
Jul 21 2015	Brief amici curiae of DRI - The Voice of the Defense Bar & PSC - The Voice of the Government Services Industry filed.
Jul 23 2015	Brief amicus curiae of Washington Legal Foundation filed.
Jul 23 2015	Brief amicus curiae of Consumer Data Industry Association filed.
Jul 23 2015	Brief amicus curiae of The National Black Chamber of Commerce filed.
Jul 23 2015	Brief amicus curiae of National Defense Industrial Association filed.
Jul 23 2015	Brief amicus curiae of KBR, Inc. filed.
Jul 23 2015	Brief amici curiae of The Chamber of Commerce of the United States of America and Business Roundtable filed.
Jul 23 2015	Brief amicus curiae of Lawyers for Civil Justice filed.
Jul 23 2015	Brief amicus curiae of Trans Union LLC filed.
Jul 29 2015	SET FOR ARGUMENT on Wednesday, October 14, 2015.
Aug 12 2015	Record requested from U.S.C.A. 9th Circuit.
Aug 12 2015	The record from U.S.C.A. 9th Circuit is electronic and located on PACER. Part of the record received is SEALED.
Aug 12 2015	The record from U.S.D.C. Central Dist. of CA. Western Div.- Los Angeles is electronic and located on PACER. Part of the record received is SEALED.
Aug 24 2015	Brief of respondent Jose Gomez filed. (Distributed)
Aug 27 2015	Brief amicus curiae of Constitutional Accountability Center filed.
Aug 31 2015	Brief amicus curiae of the United States filed. (Distributed)
Aug 31 2015	Brief amicus curiae of National Right to Work Legal Defense Foundation, Inc. filed. (Distributed)
Aug 31 2015	Brief amici curiae of Legal Aid Society of the District of Columbia, et al. filed. (Distributed)
Aug 31 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 31 2015	CIRCULATED
Aug 31 2015	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed. (Distributed)
Aug 31 2015	Brief amici curiae of Public Justice, P.C. and AARP Foundation Litigation filed. (Distributed)
Aug 31 2015	Brief amicus curiae of NECA-IBEW Welfare Trust Fund filed. (Distributed)
Aug 31 2015	Brief amici curiae of National Employment Lawyers Association, et al. filed. (Distributed)
Sep 22 2015	Reply of petitioner Campbell-Ewald Company filed. (Distributed)
Sep 28 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 14 2015	Argued. For petitioner: Gregory G. Garre, Bethesda, Md. For respondent: Jonathan F. Mitchell, Stanford, Cal.; and Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

14-857



No. ____

In the Supreme Court of the United States

CAMPBELL-EWALD COMPANY,
Petitioner,

v.

JOSE GOMEZ,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim.

2. Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified.

3. Whether the doctrine of derivative sovereign immunity recognized in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), for government contractors is restricted to claims arising out of property damage caused by public works projects.

RULE 29.6 STATEMENT

Petitioner Campbell-Ewald Company is a wholly-owned subsidiary of The Interpublic Group of Companies, Inc. No other person or publicly held corporation owns 10% or more of the stock of Campbell-Ewald Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Campbell-Ewald Company (Campbell-Ewald) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-21a) is reported at 768 F.3d 871. The order of the district court denying Campbell-Ewald's motion to dismiss (*id.* at 35a-51a) is reported at 805 F. Supp. 2d 923. The order of the district court granting summary judgment in favor of Campbell-Ewald (*id.* at 22a-34a) is unreported, but available at 2013 WL 655237.

JURISDICTION

The court of appeals entered judgment on September 19, 2014. App. 1a-2a. On October 24, 2014, the court of appeals granted Campbell-Ewald's motion to stay the mandate pending this Court's review. *Id.* at 62a-63a. On December 8, 2014, Justice Kennedy granted a timely application to extend the time within which to petition for certiorari to January 19, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

Article III, Section 2 of the U.S. Constitution, pertinent provisions of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, and Federal Rule of Civil Procedure 68(a) are set forth in the Appendix hereto at 64a-68a.

INTRODUCTION

This case presents the jurisdictional question that this Court granted certiorari to decide in *Genesis*

Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013)—whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claims. In *Genesis Healthcare*, the Court was unable to decide whether an offer of complete relief moots a plaintiff's individual claim because it concluded that the issue was not properly presented in that case. *Id.* at 1528-29. The acknowledged circuit conflict on that issue persists. This case presents an ideal vehicle for this Court to decide that issue, along with the equally important question whether an offer of complete relief before class certification moots a named plaintiff's class claim under Federal Rule of Civil Procedure 23.

This case underscores the need for the Court's resolution of these issues. It involves a class action brought under the Telephone Consumer Protection Act (TCPA) against a national marketing firm (petitioner Campbell-Ewald) over a text message that Campbell-Ewald sent on behalf of the U.S. Navy to recruit new sailors. The TCPA provides for small statutory damages—$500 per violation—for unauthorized messages. But the Act has become an extortionist weapon in the hands of class action attorneys seeking to extract lucrative attorneys' fees for class-wide settlements. In response, many defendants, including Campbell-Ewald here, have offered plaintiffs complete relief on their individual claims at the outset—before any class is certified—agreeing to make plaintiffs whole for any TCPA violations, while sparing all the costs of protracted litigation. In the decision below, the Ninth Circuit held that an offer of complete relief fails to moot either the plaintiff's individual claim or his class claim. That decision contravenes basic Article III

principles, directly conflicts with the decisions of other circuits, and warrants this Court's review.

The Ninth Circuit's decision in this case also raises an additional question that merits this Court's review. After concluding that this case was not moot despite Campbell-Ewald's offer of complete relief, the Ninth Circuit reversed the district court's holding that, under *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), Campbell-Ewald was entitled to derivative sovereign immunity from liability for recruiting activities carried out under a valid contract with the Navy. The Ninth Circuit's immunity ruling rests on the remarkable and unsupported proposition that *Yearsley* applies "only in the context of property damage resulting from public works projects." App. 16a. That ruling not only is at odds with *Yearsley* and the decisions of other courts of appeals, but also seriously erodes a bedrock protection for those who carry out valid government contracts for the public good. The Ninth Circuit's categorical and illogical limit on the scope of the derivative sovereign immunity doctrine independently warrants this Court's review.

STATEMENT OF THE CASE

A. Plaintiff's Lawsuit

Recruiting is one of the armed services' most important missions. In undertaking this critical mission, the U.S. Navy contracts with outside advertising agencies, including (for the last dozen years) Campbell-Ewald. C.A.E.R. 2, 503, 520.[1] In 2006, as part of an ongoing contract, the Navy directed

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[1] C.A.E.R. refers to the court of appeals excerpts of record. C.A.S.E.R refers to the supplemental excerpts.

Campbell-Ewald to develop a mobile marketing campaign using emerging forms of technology. *See id.* at 557-67, 671-72 678-803. The contract expressly provided for oversight of Campbell-Ewald's work and required the Navy to approve all deliverables provided by Campbell-Ewald. *Id.* at 696, 699-704, 718-19. During the course of the contract, the Navy was "in constant contact with Campbell-Ewald on a daily basis" for input or approval. C.A.S.E.R. 83.

In 2005, the Navy authorized funds for Campbell-Ewald to explore new media opportunities, including text messaging. C.A.E.R. 400-02, 766. Campbell-Ewald submitted a proposed media plan that included an option for mobile marketing to expand the Navy's efforts via text messaging. *Id.* at 625, 759-64. The Navy "liked the idea of contacting people via text message" and approved the plan. C.A.S.E.R. 72. To execute this plan, Campbell-Ewald contracted with a separate entity, MindMatics LLC, to deliver the "'Navy branded SMS (text) direct mobile "push" program to the cell phones of 150,000 Adults 18–24 from an opt-in list of over 3 million.'" App. 25a (citation omitted); *see* C.A.E.R. 406-16. MindMatics was responsible for the actual execution of the text messaging campaign. C.A.E.R. 531-50.

Together, Campbell-Ewald and the Navy developed the text message that is the subject of this lawsuit. *Id.* at 523, 601; C.A.S.E.R. 54. The message read:

> Destined for something big? Do it in the Navy. Get a career. An education. And a chance to serve a greater cause. For a FREE Navy video call [number].

App. 2a. The copy of the message was revised and approved by the Navy. *Id.* MindMatics "handled the

deployment, transmission and delivery of the text messages." *Id.* at 26a. Campbell-Ewald had no involvement in transmitting the messages. C.A.E.R. 523-24.

Plaintiff claims to have received this text message in May 2006, along with approximately 100,000 other individuals. He claims that he did not consent to receive the message. App. 3a, 36a. Three years and ten months after receiving the message, Plaintiff filed an action under the TCPA, naming Campbell-Ewald—but not the Navy or Mindmatics—as the defendant. *Id.* at 2a-3a. In addition to bringing an individual claim against Campbell-Ewald, Plaintiff sought to represent a putative nationwide class of "other unconsenting recipients of the Navy's recruiting messages," pursuant to Federal Rule of Civil Procedure 23. *Id.* at 3a. Plaintiff sought damages for the alleged TCPA violation on an individual and class-wide basis, seeking hundreds of millions of dollars on behalf of the class. App. 2a, 22a; *see also* C.A.E.R. 57-63 (complaint).[2]

B. Campbell-Ewald's Unaccepted Offers Of Full Relief And District Court Proceedings

Before any class was certified and before Plaintiff had even moved for certification, Campbell-Ewald attempted to resolve the case by offering Plaintiff complete relief on his claim. App. 52a-61a. Campbell-Ewald tendered an offer of judgment pursuant to Federal Rule of Civil Procedure 68 (*id.* at 52a-56a) as well as a separate settlement offer (*id.* at 57a-61a) that

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[2] The TCPA provides statutory damages of $500 per violation, which can be trebled for willful and knowing violations. 47 U.S.C. § 227(b)(3).

would have fully satisfied Plaintiff's claim. In each, Campbell-Ewald offered to (1) pay Plaintiff $1503 for each unsolicited text message that Plaintiff allegedly received from or on behalf of Campbell-Ewald (over three times the statutory amount of $500 per violation set by Congress); (2) pay all reasonable costs that Plaintiff would recover if he were to prevail; and (3) stipulate to an injunction prohibiting it from the alleged wrongs. *Id.* at 38a-39a; 52a-61a.

Plaintiff did not accept these offers. *Id.* at 3a. Instead, he filed a motion to strike the Rule 68 offer and a motion for class certification pursuant to the deadline to which the parties stipulated. *Id.* at 39a. Campbell-Ewald moved to dismiss the action for lack of jurisdiction, arguing that its offers of complete relief mooted both Plaintiff's individual and class claims under basic Article III principles. *Id.* at 39a-40a.

The district court denied Campbell-Ewald's motion. *Id.* at 35a. The court acknowledged that Campbell-Ewald's offers "would have fully satisfied the individual claims asserted ... by Plaintiff in this action." *Id.* at 40a. But the court held that the offers mooted neither Plaintiff's individual claim nor his class claim. As to the class claim, the court held that Plaintiff's class certification motion (filed after Campbell-Ewald made its offers of full relief) could relate back to the filing of the class complaint (before Campbell-Ewald had made its offers). *Id.* at 49a-50a. The court then granted Plaintiff's motion to strike the Rule 68 offer, reasoning that "because Plaintiff did not accept Defendant's offer of judgment, Defendant was not entitled under Rule 68 to file the offer of judgment." *Id.* at 49a. The court held that Campbell-Ewald's separate settlement offer—which remained

(and remains) open by its terms—did not moot Plaintiff's claim for the same reasons. *Id.*

After a period of discovery, Campbell-Ewald moved for summary judgment, arguing, *inter alia*, that it was entitled to derivative sovereign immunity. Campbell-Ewald explained that, under this Court's decision in *Yearsley*, it could not be held liable for an alleged TCPA violation for which the Navy itself could not held liable, given that Campbell-Ewald was simply carrying out validly conferred authority under a contract with the Navy. *Id.* at 30a. The district court granted Campbell-Ewald's motion, holding that it is entitled to derivate sovereign immunity. *Id.* at 33a-34a.

The district court explained that it is undisputed that "the Navy cannot be sued for violation of the TCPA" because the United States has not waived its sovereign immunity from suit under the TCPA. *Id.* at 30a. In addition, the court found that Plaintiff "points to no evidence indicating that [Campbell-Ewald] exceeded the scope of its authority to send the text message at issue." *Id.* at 32a. Indeed, the court explained, the "undisputed" facts show that "[Campbell-Ewald] acted at the Navy's direction to effectuate [the] text message recruitment campaign." *Id.* at 33a. Accordingly, the court concluded that, "[a]cting as a Navy contractor, [Campbell-Ewald] is immune from liability under the doctrine of derivate sovereign immunity." *Id.* at 33a-34a.

Plaintiff appealed.

C. Campbell-Ewald's Motion To Dismiss Plaintiff's Appeal For Lack Of Jurisdiction

A month after Plaintiff appealed, this Court decided *Genesis Healthcare*, which held that an unaccepted

offer of full relief under Rule 68 mooted a collective action under the Fair Labor Standards Act (FLSA). The Court first considered whether the offer mooted plaintiff's individual claim—an issue on which the Court acknowledged the circuits are "split." 133 S. Ct. at 1528 & n.3. But the Court concluded that it could not "reach this question, or resolve the split, because the issue is not properly before us" (due to the "absence of a cross-petition from respondent" on the issue). *Id.* at 1528-29. Accordingly, the Court "assume[d], without deciding, that petitioners' Rule 68 offer mooted [plaintiff]'s individual claim." *Id.* at 1529.

Next, the Court considered whether the "collective-action allegations" in the complaint were justiciable where the lone plaintiff's individual claim had become moot because of the offer of full relief. *Id.* The Court held that, under "straightforward application of well-settled mootness principles," the entire suit became moot when the plaintiff's individual claim became moot "because she lacked any personal interest in representing others in this action." *Id.* The Court rejected the argument that an "'inherently transitory' class-action claim" could render the collective-action claim justiciable under the "relation-back rationale" of *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), and related cases. 133 S. Ct. at 1530-32. As the Court explained, the relation-back doctrine is based "on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy," and there was nothing "fleeting" about plaintiff's claims. *Id.* at 1531.

Justice Kagan—joined by Justices Ginsburg, Breyer, and Sotomayor—dissented. Justice Kagan explained that she would have reached and resolved

the undecided question and held that an unaccepted offer of full relief "will *never*" moot the plaintiff's individual claim, and therefore can never moot the collective claim either. *Id.* at 1536 (Kagan, J., dissenting). In her view, the Court should "have resolved this case (along with a circuit split) by correcting the Third Circuit's view that an unaccepted offer mooted [plaintiff's] individual claim." *Id.* at 1537.

After *Genesis Healthcare*, Campbell-Ewald moved to dismiss Plaintiff's appeal for lack of jurisdiction, arguing that *Genesis Healthcare* makes clear that "the relation-back doctrine does not permit a plaintiff to pursue an action on behalf of others when offered full individual relief before seeking class certification." C-E Mot. 2, ECF No. 8 (9th Cir. June 24, 2013). As Campbell-Ewald explained (*id.* at 14), *Genesis Healthcare* corrected the reasoning of prior Ninth Circuit precedent—such as *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011)—that invoked the relation-back doctrine in holding that a plaintiff was not barred from pursuing a class claim even though a settlement offer fully satisfied his individual claim. The Ninth Circuit denied Campbell-Ewald's motion without prejudice to Campbell-Ewald renewing the arguments in its answering brief. Order, ECF No. 17 (9th Cir. Aug. 20, 2013).

Two months later, the Ninth Circuit decided *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948 (9th Cir. 2013). In *Diaz*, the Ninth Circuit considered "whether an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim is sufficient to render the claim moot." *Id.* at 952. The court acknowledged that "[o]ther circuits are divided on the question" and that the majority view is "that an

unaccepted offer will moot a plaintiff's claim." *Id.* at 952-53 (citing *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991)). But the court rejected the majority view because "four justices of the United States Supreme Court ... embraced a contrary position in *Genesis Healthcare*." *Id.* at 953. The court explained that it was "persuaded that Justice Kagan has articulated the correct approach," quoted at length from Justice Kagan's dissenting opinion in *Genesis Healthcare*, and ultimately held "that an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot." *Id.* at 954-55.

Several months later, Campbell-Ewald filed its answering brief on appeal, along with a petition for an initial en banc hearing on the jurisdictional issue. In both its brief and en banc petition, Campbell-Ewald explained that the majority in *Genesis Healthcare* rejected the very reasoning employed by *Pitts*. C-E CA9 Br. 3-4, 16; C-E En Banc Pet. 11-12. Campbell-Ewald also explained that *Diaz* had erred in basing its holding on the dissenting opinion in *Genesis Healthcare*, and that *Diaz* conflicted with the majority of the courts of appeals to have addressed the jurisdictional question. C-E En Banc Pet. 7-9. The Ninth Circuit declined to grant Campbell-Ewald's en banc petition. CA9 Docket Entry 40 (denying request).

In response to Campbell-Ewald's motion to dismiss the appeal and answering brief, Plaintiff defended the Ninth Circuit's decision in *Diaz* and asserted various arguments for why the Court should not reach the jurisdictional issue, including (1) that the offer did fully satisfy Plaintiff's claim because it did not include attorney's fees (even though not available under the TCPA), (2) the Rule 68 offer was "stricken from the

record," and (3) Campbell-Ewald had agreed to extend the date for seeking class certification while its motion to dismiss was pending. Pl. CA9 Reply 2-6 & nn.3-4.

D. The Ninth Circuit's Decision

The Ninth Circuit held that the case was not moot despite Campbell-Ewald's offers of complete relief and reversed the district court's ruling that Campbell-Ewald was entitled to derivative sovereign immunity.

On jurisdiction, the Ninth Circuit squarely reached the issue (declining to accept Plaintiff's various procedural objections) and held that neither Plaintiff's individual claim nor the class claim was mooted by Campbell-Ewald's offers of full relief. App. 4a-7a. First, the court held that "'[a]n unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot.'" *Id.* at 5a (quoting *Diaz*, 732 F.3d at 950). Next, the court held that, "the putative class claims are not moot." *Id.* Although the court observed that "*Genesis* undermined some of the reasoning employed in *Pitts* and *Diaz*," the court concluded that *Genesis Healthcare* "is not 'clearly irreconcilable' with *Pitts* or *Diaz*" because the collective claims in *Genesis Healthcare* arose under the FLSA, not Rule 23. *Id.* at 6a-7a (citation omitted).

On immunity, the Ninth Circuit held that this Court's decision in *Yearsley*—on which the district court had relied in finding derivative immunity—is "not applicable" to this dispute. *Id.* at 15a. The court explained that *Yearsley* established only "a narrow rule regarding claims arising out of property damage caused by public works projects." *Id.* In addition, the court declared that "[the Ninth Circuit], in particular, has rarely allowed use of the defense, and only in the

context of property damage resulting from public works projects." *Id.* at 16a. According to the court, there was thus no basis for applying "the [derivative sovereign immunity] doctrine to the present dispute." *Id.* at 16a-17a. The court disposed of Campbell-Ewald's remaining arguments and remanded for further proceedings. *Id.* at 20a.

The Ninth Circuit stayed its mandate pending this Court's review on certiorari. *Id.* at 62a-63a.

REASONS FOR GRANTING THE WRIT

This Court has already concluded that the threshold jurisdictional question presented by this case warrants certiorari. In *Genesis Healthcare*, the Court granted certiorari to decide that same issue—and resolve the acknowledged circuit split underlying it. But the Court was unable to decide whether an offer of complete relief moots a plaintiff's individual claim because it concluded the issue was not properly presented. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528-29 (2013). The circuit split over this issue persists, and the resolution of that split is needed even more urgently now. Lower courts have been emboldened by the dissenting opinion in *Genesis Healthcare* to dismiss jurisdictional defects with respect to both individual and class claims when, as here, a defendant makes an offer that would fully satisfy the plaintiff's claim. Certiorari is warranted to resolve the jurisdictional issues presented, as well as the important derivative sovereign immunity question raised by the Ninth Circuit's ruling on the merits.

I. CERTIORARI IS WARRANTED ON THE JURISDICTIONAL QUESTIONS

As this Court has stressed, "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *DaimlerChrsyler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citation omitted). The Ninth Circuit's decision in this case contravenes that limitation by disregarding the "well-settled mootness principles" recognized in *Genesis Healthcare*: (1) a plaintiff "must demonstrate that he possesses a legally cognizable interest, or personal stake in the outcome of the action," (2) "an actual controversy must be extant at all stages of review," and (3) "[i]f an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." 133 S. Ct. at 1528-29 (citation and internal quotation marks omitted). Ignoring these bedrock principles, the Ninth Circuit permitted Plaintiff's lawsuit to proceed despite the absence of a dispute to litigate or a plaintiff with a personal stake in the outcome of the lawsuit—in direct conflict with the decisions of this Court and those of other circuits.

A. As This Court Has Recognized, The Circuits Are Split On Whether An Offer Of Full Relief Moots A Plaintiff's Individual Claim

This Court recognized in *Genesis Healthcare* that "the Courts of Appeals disagree whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot." 133 S. Ct. at 1528.

That conflict—which the Court was unable to resolve in *Genesis Healthcare*—warrants this Court's review.

1. The majority of the courts of appeals—including the Third, Fourth, Fifth, Sixth, and Seventh Circuits—hold that an offer that fully satisfies a plaintiff's claim moots a plaintiff's individual claim. *See, e.g., Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004); *Warren v. Sessions & Rogers, P.A.*, 676 F.3d 365, 371 (4th Cir. 2012) ("When a Rule 68 offer unequivocally offers a plaintiff all of the relief 'she sought to obtain,' the offer renders the plaintiff's action moot." (citation omitted)); *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 502 (5th Cir. 2005) (plaintiff's "individual claims were rendered moot" where defendant offered "a settlement equal to the statutory limit on his damages"); *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 574-75 (6th Cir. 2009) ("[A]n offer of judgment that satisfies a plaintiff's entire demand moots the case . . . .")[3]; *Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999) (offer of complete relief "eliminates a legal dispute upon which federal jurisdiction can be based").

In addition, the Third and Seventh Circuits have held, in circumstances identical to this case, that an offer of complete relief to the plaintiff before it moves for class certification "will generally moot the plaintiff's

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[3] The Sixth Circuit has further held that, although an offer that fully satisfies a plaintiff's claim moots the plaintiff's claim, a plaintiff should not "lose[] outright when he refuses an offer of judgment that would satisfy his entire demand." *O'Brien*, 575 F.3d at 575. Accordingly, the Sixth Circuit advises district courts that the "better approach" is to "enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment." *Id.* at 574-75.

[individual] claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation." *Weiss*, 385 F.3d at 340; *see Damasco v. Clearwire Corp.*, 662 F.3d 891, 895 (7th Cir. 2011) ("'Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright because he has no remaining stake.'" (quoting *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991))); *see also Genesis Healthcare*, 656 F.3d at 195 (holding that a plaintiff's individual FLSA claim was mooted by a Rule 68 offer); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 919 (5th Cir. 2008) (same).[4]

2. The Ninth Circuit's decision in this case directly conflicts with these decisions. The court below squarely held that Plaintiff's "individual claim is not moot," notwithstanding Campbell-Ewald's offers of complete relief. App. 4a. The court explained that, in its view, "[a]n unaccepted Rule 68 offer that would

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[4] Leading commentators have adopted this position too. *See, e.g.*, 13B Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3533.2 (3d ed. 2008) ("Even when one party wishes to persist to judgment, an offer to accord all of the relief demanded may moot the case."); 1 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 4:28 (9th ed. 2012) ("Traditional mootness principles provide that an offer of judgment under Federal Rule of Civil Procedure 68 that satisfies a plaintiff's entire demand moots the claim." (footnote omitted)); 1 William B. Rubenstein *et al.*, *Newberg on Class Actions* § 2:15 (5th ed. 2013) ("If the defendant makes a full offer of judgment pursuant to Rule 68, completely satisfying all of the named plaintiff's individual claims, then the named plaintiff's individual case necessarily becomes moot.").

fully satisfy a plaintiff's claim is insufficient to render the claim moot.'" App. 5a (quoting *Diaz*, 732 F.3d at 950). The conflict is square and undeniable. Indeed, in *Diaz*—on which the court explicitly relied below—the Ninth Circuit recognized that its position was at odds with "the majority of courts." 732 F.3d at 950.

The Eleventh Circuit recently sided with the Ninth Circuit in *Stein v. Buccaneers Limited Partnership*, 772 F.3d 698 (11th Cir. 2014), and held that an unaccepted Rule 68 offer of judgment does not moot a plaintiff's individual claim, *id.* at 703. Following Justice Kagan's dissent—and the Ninth Circuit's decision in *Diaz* embracing "the position set out in [that] dissent," *id.*—the Eleventh Circuit reasoned that the Rule 68 offer could not have mooted plaintiff's individual claim where the offer was not accepted. *Id.* at 703-04; *see also id.* at 703 ("At least one circuit has explicitly adopted the position set out in the [*Genesis Healthcare*] dissent." (citing *Diaz*, 732 F.3d at 954-55)).

The Second Circuit has adopted an intermediate approach—though one that, at least in practical effect, aligns more closely with the majority view. Like the Ninth and Eleventh Circuits, the Second Circuit holds that where a plaintiff has not accepted a defendant's offer of full relief, the case is not moot because "the controversy ... is still alive." *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 342 (2d Cir. 2005). But unlike the Ninth and Eleventh Circuits, the Second Circuit has held that the "better resolution" of the case in those circumstances is to enter a default judgment against the defendant for the amount offered in the offer of complete relief. *Id.*; *see also Cabala v. Crowley*, 736 F.3d 226, 228-29 & n.2 (2d Cir. 2013) (discussing *McCauley* and recognizing circuit conflict).

As this case illustrates, the Ninth Circuit's position on the effect of an offer of full relief contravenes fundamental mootness principles. Plaintiff sought relief for an alleged violation of the TCPA based on receipt of a single text message. Campbell-Ewald responded by making an offer of judgment and a separate settlement offer that—as the district court found—"would have fully satisfied the individual claims asserted . . . by Plaintiff in this action." App. 40a. At that point, there was no remaining dispute over which to litigate and Plaintiff had no continuing stake in the litigation and nothing more to gain from its continuing pursuit. *See, e.g.*, *Rand*, 926 F.2d at 597-98. Accordingly, the action should have been dismissed as moot. At a minimum, the district court should have entered judgment in accordance with the defendant's offer of judgment. *O'Brien*, 575 F.3d at 575. Instead, the Ninth Circuit permitted the action to proceed.

This Court's intervention is needed to resolve this clear circuit conflict. That was true when the Court granted certiorari in *Genesis Healthcare*. But it is even more true today given the doubt that the dissenting opinion in *Genesis Healthcare* has created over whether the Court's threshold assumption in *Genesis Healthcare*—that the plaintiff's individual claims were moot—was correct. As illustrated by the Ninth Circuit's decisions in this case and *Diaz* and the Eleventh Circuit's decision in *Stein*, courts of appeals have followed Justice Kagan's dissent in *Genesis Healthcare* and essentially dismissed *the Court's* decision in *Genesis Healthcare* on the ground that it was decided on a faulty premise (as Justice Kagan argued). That trend has created more unrest. Courts

of appeals are bound to follow the majority decisions of this Court—not statements in dissenting opinions.

The circuits that have followed Justice Kagan's dissent may believe that the majority in *Genesis Healthcare* simply felt compelled to accept the premise that the offer of complete relief mooted the plaintiff's individual claims because of the way the case was litigated, but did not actually believe that mootness principles supported that result. That view, however, is belied not only by the Article III principles discussed by the majority (133 S. Ct. at 1528-29), but also by the Court's response to Justice Kagan's dissent (*id.* at 1529 n.4). In any event, this Court should grant certiorari and finally resolve this important issue.

B. The Ninth Circuit's Holding That The Class Claim Is Not Moot Conflicts With *Genesis Healthcare* And Decisions Of Other Courts

The Ninth Circuit's holding that Campbell-Ewald's offer of full relief does not moot Plaintiff's class claim presents its own conflict of authority and independently warrants this Court's review.

1. To begin, the Ninth Circuit's decision is at odds with *Genesis Healthcare*, which held that plaintiff's representative action "became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action" at that time. 133 S. Ct. at 1529. The plaintiff argued that she had "a sufficient personal stake in [the] case based on a statutorily created collective-action interest in representing other similarly situated employees" to keep her collective claims alive despite the fact that her individual claims were moot. *Id.* at 1530. This Court disagreed, explaining that the plaintiff's nascent hope of representing others did not "preserve her suit from

mootness." *Id.* The Court explained that "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." *Id.* at 1529. Once her individual claim became moot, the plaintiff had "no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness." *Id.* at 1532.

Genesis Healthcare rejects the rationale that the Ninth Circuit relied on in *Pitts* in concluding that the class claims were *not* mooted. The key to the Ninth Circuit's position that the mooting of a plaintiff's individual claim does not moot his class claim is the purportedly "inherently transitory" nature of class claims. *Pitts*, 653 F.3d at 1091. According to the Ninth Circuit, "inherently transitory claims" include class claims "'acutely susceptible to mootness' in light of [the defendant's] tactic of '*picking off*' lead plaintiffs with a Rule 68 offer to avoid a class action." *Id.* (alteration in original) (emphasis added) (citation omitted). But *Genesis Healthcare* rejected the argument that the risk that "defendants can strategically use Rule 68 to 'pick off' named plaintiffs before the collective-action process is complete, render[s] collective actions 'inherently transitory' in effect." 133 S. Ct. at 1531. As the Court explained, the Court's relation-back doctrine "has invariably focused on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendants' litigation strategy." *Id.*[5]

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[5] As *Genesis Healthcare* reiterated, "[t]he 'inherently transitory' rationale was developed to address circumstances in which the challenged conduct was effectively unreviewable," such as where a plaintiff seeks

In the decision below, the Ninth Circuit conceded that *Genesis Healthcare* "undermined some of the reasoning employed in *Pitts* and *Diaz*." App. 6a. But the court reasoned that this precedent survived *Genesis Healthcare* because of differences between Rule 23 class actions and FLSA collective actions. *See* App. 6a-7a. Not so. In a Rule 23 class action, "a putative class acquires an independent legal status once it is certified under Rule 23," whereas "conditional certification [under the FLSA] does not produce a class with an independent legal status." 133 S. Ct. at 1530. But before a district court rules on class certification, a plaintiff bringing representative claims under Rule 23 is in the same position as a plaintiff bringing representative claims under the FLSA. In a Rule 23 class action, no less than in a FLSA collective action, a putative class representative has no "personal stake" in representing unnamed class members that would "preserve [the] suit from mootness." *Id.* Any relevant difference between FLSA collective actions and Rule 23 class actions emerges after, not before, certification.

As in *Genesis Healthcare*, the Court's decisions in *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), and *Sosna v. Iowa*, 419 U.S. 393 (1975), "are, by their own terms, inapplicable." 133

"to bring a class action challenging the constitutionality of temporary pretrial detentions." 133 S. Ct. at 1530. Because "pretrial custody likely would end prior to the resolution of his claim," the relation-back doctrine is necessary to prevent the defendant's conduct from being "insulate[d] ... from review." *Id.* at 1531. The claim in *Genesis Healthcare*, like the claims here, did not challenge conduct, like a temporary pretrial detention, that is "fleeting." *Id.*

S. Ct. at 1529. *Geraghty* is inapplicable here because no class was certified at the time of the offers of full relief (indeed, Plaintiff had yet to move for certification) and, accordingly, there is "simply no certification decision to which [his] claim could have related back." *Genesis Healthcare*, 133 S. Ct. at 1530. *Sosna*'s "inherently transitory" exception is inapplicable because, as explained, there is nothing "fleeting" about the challenged conduct here that could cause it to evade review. *Id.* at 1531. And *Roper* is inapplicable because "*Roper*'s holding turned on a specific factual finding that the plaintiffs possessed a continuing personal economic stake in the litigation, even after the defendants' offer of judgment." *Id.* That personal stake is missing where, as here, the defendant's Rule 68 or settlement offer "provide[s] complete relief on [the plaintiff's] individual claims." *Id.*

2. The Ninth Circuit's decision also exacerbates a circuit split on whether and how an offer of full relief that moots an individual claim moots class claims under Rule 23 as well. The Third, Fifth, Ninth, Tenth, and Eleventh Circuits have held that the relation-back doctrine may be invoked to keep a class action alive even where the plaintiff's individual claim becomes moot. *See, e.g.*, *Weiss*, 385 F.3d at 348 ("Absent undue delay in filing a motion for class certification, therefore, where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint."); *Sandoz*, 553 F.3d at 920 ("The proper course . . . is to hold that when a FLSA plaintiff files a timely motion for certification of a collective action, that motion relates back to the date

the plaintiff filed the initial complaint . . . ."); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1247-50 (10th Cir. 2011) ("[A] nascent interest attaches to the proposed class upon the filing of a class complaint such that a rejected offer of judgment . . . does not render the case moot under Article III."); *Stein*, 772 F.3d at 704-09 (same).

By contrast, the Fourth, Seventh, and Eighth Circuits have held that the entire class action suit becomes moot along with the named plaintiff's individual claim when, as here, the defendant makes an offer of full relief before class certification. *See, e.g.*, *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 100 (4th Cir. 2011) ("[W]hen a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, as happened in this case, there is no longer a 'self-interested party advocating' for class treatment in the manner necessary to satisfy Article III standing requirements."); *Damasco*, 662 F.3d at 896 ("To allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III."); *Anderson v. CNH U.S. Pension Plan*, 515 F.3d 823, 826-27 (8th Cir. 2008) ("[T]he voluntary settlement reached by the named plaintiffs with both defendants leads us to conclude that the entire case is now moot.").

As discussed above, the principles set forth in *Genesis Healthcare* should apply equally to Rule 23 class actions and should settle the split in favor of the Fourth, Seventh, and Eighth Circuits. But as the Ninth Circuit's decision below demonstrates, until this Court says so in the Rule 23 context, courts will persist

in applying their erroneous view of the relation-back doctrine in contravention of *Genesis Healthcare*. Indeed, the Ninth Circuit is not the only court of appeals to continue to apply its erroneous rule despite *Genesis Healthcare*. Both the Fifth and Eleventh Circuits have done so as well, holding that *Genesis Healthcare* is inapplicable to Rule 23 class actions. *See Mabary v. Home Town Bank, N.A.*, 771 F.3d 820, 824-25 (5th Cir. 2014); *Stein*, 772 F.3d at 708. Nevertheless, in *Stein* the Eleventh Circuit acknowledged that the circuits are split on this issue. 772 F.3d at 708.

Certiorari is warranted to resolve this conflict. *Genesis Healthcare* should have clarified the law in this area. But the fact that the Court could not decide whether an offer of full relief moots an individual claim coupled with Justice Kagan's dissenting opinion have created further conflict and confusion on this issue. So far, the only message that has influenced the lower courts is Justice Kagan's admonition in dissent, "Don't try this at home." 133 S. Ct. at 1534.

II. CERTIORARI IS WARRANTED ON THE DERIVATIVE IMMUNITY QUESTION

The jurisdictional issues should have ended this case. But when it reached the merits, the Ninth Circuit made another ruling that independently warrants this Court's review. The court held that the derivative sovereign immunity doctrine grounded in *Yearsley*, is "not applicable" to this dispute on the ground that *Yearsley* established only "a narrow rule regarding claims arising out of property damage caused by public works projects." App. 15a; *see id.* at 16a ("This Court, in particular, has rarely allowed use of this defense, and only in the context of property damage resulting from public works projects."). That

ruling fundamentally misconstrues and unduly limits the doctrine of derivative sovereign immunity.

1. In *Yearsley*, the Court held that the doctrine of derivative sovereign immunity foreclosed tort claims brought against a private contractor that performed services on behalf of the U.S. government. The contractor was hired by the government to improve navigation on the Missouri river and, in that capacity, built several dikes along the river. 309 U.S. at 19. The plaintiff alleged that dikes had damaged its land. In holding that the contractor was entitled to derivative immunity, the Court explained: "[I]f th[e] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." *Id.* at 20-21. Because the contractor's work was "authorized and directed by the Government of the United States," the contractor could not be held liable for its actions. *Id.* at 20.

Yearsley established a general rule that government contractors are immune from liability for performing duties within the scope of their lawfully delegated authority. As the Court put it, there is "no ground for holding [the government's] agent liable who is simply acting under the authority thus validly conferred." *Id.* at 21-22. Nothing in the Court's opinion restricts the derivative immunity doctrine to "the context of property damage resulting from public works projects" (App. 16a). And such a limitation would be illogical. The important interests served by the derivative immunity doctrine do not turn on either the type of project being carried out (public works or otherwise), or the type of injury asserted (property damage or otherwise). What matters is whether the

contractor was acting within the scope of validly conferred authority in undertaking the project.

This Court's precedents confirm the Ninth Circuit's misreading of *Yearsley*. For example, in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 506 (1988)—a products liability case not involving a public works project or property damages—the Court favorably recounted its holding in *Yearsley* that "if [the] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." The Court in no way suggested that the derivative immunity doctrine is limited to the particular facts of *Yearsley*. Indeed, although the decision in *Boyle* was ultimately grounded in principles of pre-emption rather than immunity, the Court unequivocally relied on *Yearsley*'s rationale and specifically noted that it saw "no basis" to limit "the federal interest justifying [the *Yearsley*] holding" only to performance contracts. *Id.*

The Ninth Circuit's restriction of the derivative immunity doctrine is also belied by the Court's discussion of basic immunity principles in *Filarsky v. Delia*, 132 S. Ct. 1657, 1662 (2012). In *Filarsky*, the Court reiterated that "'the most important special government immunity-producing concern'" is "the government interest in avoiding 'unwarranted timidity' on the part of those engaged in the public's business." *Id.* at 1665 (citation omitted). In addition, the Court emphasized that "[e]nsuring that those who serve the government do so 'with the decisiveness and the judgment required by the public good,' is of vital importance regardless whether the individual sued as a state actor works full-time or on some other basis." *Id.*

So too, ensuring such decisiveness is of "vital importance" regardless of whether a contract is for a "public works project" (App. 15a-16a) or some other aspect of the public's business—like recruiting applicants for the nation's armed services.

2. The Ninth Circuit's decision confining derivative immunity to "public works projects" also is at odds with the opinions of other courts of appeals that have recognized the continuing vitality of *Yearsley* and its application outside those confines. *See, e.g., Butters v. Vance International*, 225 F.3d 462, 466 (4th Cir. 2000) (applying *Yearsley* to private agents of foreign governments); *Tozer v. LTV Corp.*, 792 F.2d 403, 405 (4th Cir. 1986) (recognizing that *Yearsley* is not confined to "construction projects"); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 354-55 (3d Cir. 1985) (citing *Yearsley* in products liability case and noting that "federal common law provides a defense to liabilities incurred in the performance of government contracts"); *Tillett v. J.I. Case Co.*, 756 F.2d 591, 596 (7th Cir. 1985) (disapproved on other grounds) (recognizing that "[c]ountless recent cases have examined the reasoning in *Yearsley* in the context of government contracts for weaponry, military hardware and general military equipment"); *Burgess v. Colorado Serum Co.*, 772 F.2d 844, 846 (11th Cir. 1985) (citing *Yearsley* and holding that vaccine manufacturer was entitled to derivative immunity).

This case presents a paradigmatic situation in which the derivative sovereign immunity doctrine was designed to apply. It is undisputed that the Navy is immune from suit under the TCPA (because the United States has not waived its sovereign immunity from suit under that Act). It is undisputed that the

Navy is authorized to contract with firms to help it carry out its vital recruiting mission. And, as the district court explained, the "undisputed" facts show that Campbell-Ewald "acted at the Navy's direction to effectuate [the] text message recruitment campaign" at issue. App. 33a. Certiorari is warranted to review the Ninth Circuit's mistaken ruling that derivative immunity is categorically barred here. And there is no basis to expose government contractors to suits in the Ninth Circuit for activities for which they would be entitled to immunity outside the Ninth Circuit.

III. THIS COURT'S REVIEW IS NEEDED

The jurisdictional issues concern the constitutional authority of the courts. They are critically important to defendants facing an increasingly common form of litigation—class actions seeking statutory damages that, while small on an individualized basis, are staggering on a class-wide basis. The TCPA has been a magnet for such class actions. *See, e.g.*, Allison Grande, *TCPA Class Action Surge Shows No Signs Of Abating*, Law360 (May 24, 2013), *available at* http://www.law360.com/articles/444874/tcpa-class-action-surge-shows-no-signs-of-abating.[6] Not surpris-

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[6] *See also, e.g.*, Paul F. Corcoran *et al.*, *The Telephone Consumer Protection Act: Privacy Legislation Gone Awry?*, 10 Intell. Prop. & Tech. L.J. 9, 9 (2014) ("Class action litigation under the TCPA has swelled into a rising tide, with TCPA class action cases increasing by 63 percent through most of 2012 according to one study, and the number of TCPA cases in general rising by approximately 70 percent in 2013 and again by over 32 percent in the first half of 2014."); Monica Desai *et al.*, *A TCPA for the 21st Century: Why TCPA Lawsuits Are on the Rise and What*

ingly, the jurisdictional issues presented by this case have arisen in other TCPA actions, as defendants have sought to avoid the costs of protracted litigation while offering to make named plaintiffs whole for any possible individualized harm. *See, e.g.*, *Stein*, 772 F.3d 698 (11th Cir.); *Damasco*, 662 F.3d 891 (7th Cir.).

This case presents an ideal vehicle to decide these issues. Unlike *Genesis Healthcare*, the issue of whether an offer of complete relief moots an individual claim is squarely presented here; Campbell-Ewald presented both a Rule 68 offer of complete relief and a separate settlement offer of complete relief, eliminating any argument that the terms of Rule 68 eliminate a finding of mootness, *cf. Stein*, 772 F.3d at 702-03; and both the Ninth Circuit (App. 4a-7a) and the district court (*id.* at 40a) recognized that Campbell-Ewald's offers would fully satisfy Plaintiff's claim. Moreover, the Ninth Circuit's conclusion in this case—

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the FCC Should Do About It, 1 Int'l J. Mobile Mktg., 75, 75-76 (2013) ("The TCPA has become fertile ground for nuisance lawsuits because class action lawyers are often rewarded with quick settlements, even in cases without any merit, simply because litigation uncertainty and the potential financial exposure resulting from a bad decision are too great a risk for a company to bear."); U.S. Chamber Institute for Legal Reform, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages* 1 (Oct. 2013) ("[E]ssentially every American business, from large to small, now finds itself at risk of having to defend against a TCPA lawsuit alleging statutory damages thousands of times in excess of any conceivable actual 'damage' associated with the mere receipt of a phone call (even if the call was not answered, and no voicemail left)."

building on the court's prior decisions in *Diaz* and *Pitts*—that Campbell-Ewald's offers of complete relief moot neither an individual nor class claim not only contravenes bedrock Article III principles, but devalues the benefits of settlement and deprives defendants of a critical, and sensible, mechanism for avoiding costly litigation while making plaintiffs whole.

This case also underscores the significant practical consequences of the jurisdictional issues presented for both litigants and the judiciary. Based on the receipt of a single text message designed to recruit for the Navy, Plaintiff filed suit under the TCPA more than three years later for non-recurring conduct. Campbell-Ewald offered to make him whole for any TCPA violation by giving him more than the maximum $1500 he could receive under the Act if he proved a willful violation, plus other relief. Yet Plaintiff declined to accept that offer. As a result, the parties have been forced to spend hundreds of thousands of dollars continuing to litigate this case, even before the issue of class certification has been adjudicated. And, perhaps more to the point, the courts have been forced to superintend that litigation—and "expound[] the law in the course of doing so." *Cuno*, 126 S. Ct. at 1861.

The derivative sovereign immunity question is also indisputably important and independently merits this Court's review. The Ninth Circuit has categorically eliminated a core component of sovereign immunity, placing any government contractor at risk for liability in that circuit for performing valid government contracts servicing critical public needs—including recruiting for our armed forces. This categorical bar is not supported by *Yearsley* and runs counter to longstanding immunity principles. Even if Campbell-

Ewald's authorized efforts to recruit for the good of the Navy and the nation's defense somehow contributed to a TCPA violation, there is no reason Campbell-Ewald should not enjoy the same immunity that the Navy unquestionably would if Plaintiff had aimed his class action demands at the government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Jose GOMEZ, individually and on behalf of a class of similarly situated individuals, Plaintiff–Appellant,

v.

CAMPBELL–EWALD COMPANY, Defendant–Appellee.

No. 13–55486.
Argued and Submitted July 11, 2014.
Filed Sept. 19, 2014.
768 F.3d 871

Before: FORTUNATO P. BENAVIDES,* KIM MCLANE WARDLAW, and RICHARD R. CLIFTON, Circuit Judges.

OPINION

BENAVIDES, Circuit Judge.

Plaintiff Jose Gomez appeals adverse summary judgment on personal and putative class claims brought pursuant to the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(1)(A)(iii) (2012). Gomez alleges that the Campbell–Ewald Company instructed or allowed a third-party vendor to send unsolicited text messages on behalf of the United States Navy, with whom Campbell–Ewald had a marketing contract. Because we conclude that Campbell–Ewald is not entitled to immunity, and

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* The Honorable Fortunato P. Benavides, Senior Circuit Judge for the U.S. Court of Appeals for the Fifth Circuit, sitting by designation.

because we find no alternate basis upon which to grant its motion for summary judgment, we vacate the judgment and remand to the district court.

I.

The facts with respect to Gomez's personal claim are largely undisputed. On May 11, 2006, Gomez received an unsolicited text message stating:

> Destined for something big? Do it in the Navy. Get a career. An education. And a chance to serve a greater cause. For a FREE Navy video call [number].

The message was the result of collaboration between the Navy and the Campbell–Ewald Company,[1] a marketing consultant hired by the Navy to develop and execute a multimedia recruiting campaign. The Navy and Campbell–Ewald agreed to "target" young adults aged 18 to 24, and to send messages only to cellular users that had consented to solicitation. The message itself was sent by Mindmatics, to whom the dialing had been outsourced. Mindmatics was responsible for generating a list of phone numbers that fit the stated conditions, and for physically transmitting the messages. Neither the Navy nor Mindmatics is party to this suit.

In 2010, Gomez filed the present action against Campbell–Ewald, alleging a single violation of 47 U.S.C. § 227(b)(1)(A)(iii), which states:

> It shall be unlawful for any person within the United States, or any person outside the

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1 The company is now known as Lowe Campbell Ewald.

> United States if the recipient is within the United States—
>
> > (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice— . . .
> >
> > (iii) to any telephone number assigned to a paging service [or] cellular telephone service . .

Gomez contends that he did not consent to receipt of the text message. He also notes that he was 40 years old at the time he received the message, well outside of the Navy's target market. It is undisputed that a text message constitutes a call for the purposes of this section. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir.2009) ("[W]e hold that a text message is a 'call' within the meaning of the TCPA."). In addition to seeking compensation for the alleged violation of the TCPA, Gomez also sought to represent a putative class of other unconsenting recipients of the Navy's recruiting text messages.

After a 12(b)(6) motion to dismiss was denied, Campbell–Ewald tried to settle the case. Campbell–Ewald offered Gomez $1503.00 per violation, plus reasonable costs, but Gomez rejected the offer by allowing it to lapse in accordance with its own terms.

Campbell–Ewald then moved to dismiss the case under Rule 12(b)(1), arguing that Gomez's rejection of the offer mooted the personal and putative class claims. After the court denied the motion, Campbell–Ewald moved for summary judgment, seeking derivative immunity under *Yearsley v. W.A. Ross Construction*

Co., 309 U.S. 18, 60 S.Ct. 413, 84 L.Ed. 554 (1940). In opposition to the summary judgment motion, Gomez presented evidence that the Navy intended the messages to be sent only to individuals who had consented or "opted in" to receive messages like the recruiting text. A Navy representative testified that Campbell–Ewald was not authorized to send texts to individuals who had not opted in. The district court ultimately granted the motion, holding that Campbell–Ewald is "immune from liability under the doctrine of derivative sovereign immunity." *Gomez v. Campbell–Ewald Co.*, No. CV 10–2007 DMG CWX, 2013 WL 655237, at *6 (C.D.Cal. Feb. 22, 2013). Gomez filed a timely appeal, arguing that the *Yearsley* doctrine is inapplicable.

This Court reviews summary judgment *de novo*, affirming only where there exists no genuine dispute of material fact. *Satterfield*, 569 F.3d at 950; *see also* FED.R.CIV.P 56(a). We are free to affirm "on any basis supported by the record." *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1047 (9th Cir.2009).

II.

We begin with jurisdiction. Upon Gomez's timely appeal, Campbell–Ewald filed a motion to dismiss for lack of jurisdiction, arguing that the personal and putative class claims were mooted by Gomez's refusal to accept the settlement offer. We denied that motion without prejudice, and now reject Campbell–Ewald's argument on the merits.

Gomez's individual claim is not moot. Campbell–Ewald argues that "whether or not the class action here is moot," the individual claim was mooted by Gomez's rejection of the offer. The company is

mistaken. Although this issue was unsettled until recently, we have now expressly resolved the question. "[A]n unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot." *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 950 (9th Cir.2013). Because the unaccepted offer alone is "insufficient" to moot Gomez's claim, and as Campbell–Ewald identifies no alternate or additional basis for mootness, the claim is still a live controversy.

Similarly, the putative class claims are not moot. We have already explained that "an unaccepted Rule 68 offer of judgment—for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification—does not moot a class action." *Pitts v. Terrible Herbst*, Inc., 653 F.3d 1081, 1091–92 (9th Cir.2011). Like the *Pitts* plaintiff, Gomez rejected the offer before he moved for class certification. Gomez's rejection therefore does not affect any class claims.

Campbell–Ewald recognizes that it is asking this panel to depart from these precedents. Yet it is well settled that we are bound by our prior decisions. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir.2003) (en banc). Although there is an exception for precedents that have been overruled, that exception applies only where "the relevant court of last resort [has] undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Ibid.* Campbell–Ewald argues that *Pitts* and *Diaz* are clearly irreconcilable with the Supreme Court's recent decision in *Genesis Healthcare Corp. v. Symczyk*, — U.S. ——, 133 S.Ct. 1523, 185 L.Ed.2d 636 (2013). Campbell–Ewald overstates the

relevance of that case, which involved a collective action brought pursuant to § 16(b) of the Fair Labor Standards Act. *Id.* at 1526–27. The defendant argued that the case was mooted by the plaintiff's rejection of a settlement offer of complete relief. *Id.* at 1528. The Supreme Court ultimately agreed, first accepting the lower court's conclusion that the personal claim was moot, and then holding that the named plaintiff had "no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness." *Id.* at 1532.

Campbell–Ewald correctly observes that *Genesis* undermined some of the reasoning employed in *Pitts* and *Diaz*. For example, the *Pitts* opinion referred to the risk that a defendant might "pick off" named plaintiffs in order to evade class litigation. 653 F.3d at 1091 (quoting *Weiss v. Regal Collections*, 385 F.3d 337, 344 (3d Cir.2004)). The *Genesis* Court distanced itself from such reasoning, pointing out that the argument had only been used once by the high Court, and only "in dicta." 133 S.Ct. at 1532 (referring to *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980)). Nevertheless, courts have universally concluded that the *Genesis* discussion does not apply to class actions.[2] In fact,

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[2] At least ten courts had expressly stated that the *Genesis* analysis does not bind courts with respect to class action claims. *E.g., Epstein v. JPMorgan Chase & Co.*, No. 13 Civ. 4744(KPF), 2014 WL 1133567, at *9 (S.D.N.Y. Mar. 21, 2014) ("The court agrees with Plaintiff that these [prior class action] cases were not affected by the Supreme Court's recent decision in *Genesis* . . . ."); *Knutson v. Schwan's Home Serv., Inc.*, No. 3:12–cv–0964–GPC–DHB, 2013 WL 4774763, at *11 (S.D.Cal. Sept.5, 2013) (concluding

Genesis itself emphasizes that "Rule 23 [class] actions are fundamentally different from collective actions under the FLSA" and, therefore, the precedents established for one set of cases are "inapplicable" to the other. 133 S.Ct. at 1529. Accordingly, because *Genesis* is not "clearly irreconcilable" with *Pitts* or *Diaz*, this panel remains bound by circuit precedent, and Campbell–Ewald's mootness arguments must be rejected. *Miller*, 335 F.3d at 900.

III.

Campbell–Ewald's constitutional challenge is equally unavailing. The company argues that the statute is unconstitutional either facially or as applied, but its argument relies upon a flawed application of First Amendment principles. Although the district court did not ultimately reach this issue, the record confirms that the challenge was properly raised below.

We have already affirmed the constitutionality of this section of the TCPA. *Moser v. FCC*, 46 F.3d 970, 973–74 (9th Cir.1995). The government may impose reasonable restrictions on the time, place, or manner of protected speech, provided that the restrictions "are justified without reference to the content of the restricted speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (quoting *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (other citations omitted)).

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that *Pitts* was not affected by *Genesis*). We are not aware of any court that has held otherwise.

In analyzing the section, the *Moser* Court focused on the content-neutral statutory language. "Because nothing in the statute requires the [Federal Communications Commission] to distinguish between commercial and noncommercial speech, we conclude that the statute should be analyzed as a content-neutral time, place, and manner restriction."[3] We then upheld the statute after finding that the protection of privacy is a significant interest, the restriction of automated calling is narrowly tailored to further that interest, and the law allows for "many alternative channels of communication." *Id.* at 974–75.

Campbell–Ewald does not contest our reasoning in *Moser*. Instead, Campbell–Ewald argues that the government's interest only extends to the protection of residential privacy, and that therefore the statute is not narrowly tailored to the extent that it applies to cellular text messages. The argument fails. First, this Court already applies the TCPA to text messages. *Satterfield*, 569 F.3d at 951–52. Second, there is no evidence that the government's interest in privacy ends at home—the fact that the statute reaches fax machines suggests otherwise. *See* 47 U.S.C. § 227(b)(1)(C). Third, to whatever extent the government's significant interest lies exclusively in residential privacy, the nature of cell phones renders

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[3] 46 F.3d at 973. Campbell–Ewald does not argue that the statute is no longer content neutral insofar as some implementing regulations distinguish between commercial and noncommercial calls. *See* 47 C.F.R. § 64.1200(a)(2) (2014); *cf. Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56 (9th Cir.1995) (holding that the TCPA's treatment of commercial facsimile transmissions, 42 U.S.C. § 227(b)(1)(C), is a constitutionally permitted content-based restriction).

the restriction of unsolicited text messaging all the more necessary to ensure that privacy. After all, it seems safe to assume that most cellular users have their phones with them when they are at home. Campbell–Ewald itself notes that in many households a cell phone *is* the home phone. In fact, recent statistics suggest that over 40% of American households now rely exclusively on wireless telephone service.[4] As a consequence, prohibiting automated calls to land lines alone would not adequately safeguard the stipulated interest in residential privacy. For all these reasons, Campbell–Ewald's argument is without merit.

Nor does the government speech doctrine provide Campbell–Ewald with a meritorious constitutional challenge. Campbell–Ewald argues that military recruiting messages are a form of government speech afforded greater protection by the First Amendment. Campbell–Ewald mischaracterizes the doctrine. The government speech doctrine is a jurisprudential theory by which the federal government can regulate its own communication "without the constraint of viewpoint neutrality." *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1017 (9th Cir.2000), *cert. denied*, 532 U.S. 994, 121 S.Ct. 1653, 149 L.Ed.2d 636 (2001). For example, the First Amendment does not require the federal government to fund messages both for and against abortion. *Cf. Rust v. Sullivan*, 500 U.S. 173, 203, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (upholding, under the government speech doctrine, regulations forbid-

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[4] *See* Karen Kaplan, *Still have a land line? 128 million don't.*, L.A. TIMES, July 8, 2014, http:// www. latimes. com/ science/ sciencenow/ la- sci- sn- wireless- only- householdsin- america- 20140708- story. html.

ding certain publicly funded doctors from endorsing abortion). Similarly, in this context, the doctrine would preclude Campbell–Ewald from demanding that the Navy create an advertising campaign that discourages military participation. The government speech doctrine is simply immaterial to the present dispute, in which the plaintiff is not advocating for viewpoint neutrality, but is instead challenging the regulation of a particular means of communication.

IV.

Campbell–Ewald nevertheless argues that it cannot be held liable for TCPA violations because it outsourced the dialing and did not actually make any calls on behalf of its client. *See* 47 U.S.C. § 227(b)(1)(A)(iii) (rendering it unlawful "to make any call" using an automated dialing system). Gomez, in fact, concedes that a third party transmitted the disputed messages. Even so, Campbell–Ewald's argument is not persuasive.

Although Campbell–Ewald did not send any text messages, it might be vicariously liable for the messages sent by Mindmatics. The statute itself is silent as to vicarious liability. We therefore assume that Congress intended to incorporate "ordinary tort-related vicarious liability rules." *Meyer v. Holley*, 537 U.S. 280, 285, 123 S.Ct. 824, 154 L.Ed.2d 753 (2003). Accordingly, "[a]bsent a clear expression of Congressional intent to apply another standard, the Court must presume that Congress intended to apply the traditional standards of vicarious liability . . ." *Thomas v. Taco Bell Corp.*, 879 F.Supp.2d 1079, 1084 (C.D.Cal.2012), *aff'd*, 582 Fed.Appx. 678, 2014 WL 2959160 (9th Cir. July 2, 2014) (per curiam). Although we have never expressly reached this question, several

of our district courts have already concluded that the TCPA imposes vicarious liability where an agency relationship, as defined by federal common law, is established between the defendant and a third-party caller.[5]

This interpretation is consistent with that of the statute's implementing agency, which has repeatedly acknowledged the existence of vicarious liability under the TCPA. The Federal Communications Commission is expressly imbued with authority to "prescribe regulations to implement the requirements" of the TCPA. 47 U.S.C. § 227(b)(2). As early as 1995, the FCC stated that "[c]alls placed by an agent of the telemarketer are treated as if the telemarketer itself placed the call." *In re Rules and Regulations Implementing the TCPA of 1991*, 10 FCC Rcd. 12391, 12397 (1995). More recently, the FCC has clarified that vicarious liability is imposed "under federal common law principles of agency for violations of either section 227(b) or section 227(c) that are committed by third-party telemarketers." *In re Joint Petition Filed by Dish Network*, LLC, 28 FCC Rcd. 6574, 6574 (2013). Because Congress has not spoken directly to this issue and because the FCC's interpretation was included in a fully adjudicated declaratory ruling, the interpretation must be afforded *Chevron* deference. *Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1065 (9th Cir.2005) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S.

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5 *Ibid. See also Kristensen v. Credit Payment Servs.*, No. 2:12–CV–00528–APG, 12 F.Supp.3d 1292, 2014 WL 1256035 (D.Nev. Mar. 26, 2014); *In re Jiffy Lube Int'l Inc.*, 847 F.Supp.2d 1253 (S.D.Cal.2012); *Kramer v. Autobytel, Inc.*, 759 F.Supp.2d 1165 (N.D.Cal.2010).

967, 980–85, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005)) (other citations omitted), *aff'd*, 550 U.S. 45, 127 S.Ct. 1513, 167 L.Ed.2d 422 (2007); *see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." (footnote omitted)).

Campbell–Ewald concedes that the FCC already recognizes vicarious liability in this context, but argues that vicarious liability only extends to the merchant whose goods or services are being promoted by the telemarketing campaign. Yet the statutory language suggests otherwise, as § 227(b) simply imposes liability upon "any person"—not "any merchant." *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 221, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008) (interpreting the use of "any" as "all-encompassing"); 47 C.F.R. § 64.1200 (interpreting the phrase "any person" to reach individuals and entities). And although the FCC's 2013 ruling may emphasize vicarious liability on the part of merchants, the FCC has never stated that vicarious liability is only applicable to these entities.[6] Indeed,

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[6] *Dish Network*, 28 FCC Rcd. at 6574. The FCC uses the word "seller," which Campbell–Ewald construes as the merchant whose goods or services are featured in the telemarketing campaign. The FCC actually defines seller as an "entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." *See* 47 C.F.R. § 64.1200(f)(9). We need not determine whether Campbell–Ewald constitutes a seller under this definition, as we conclude that vicarious liability turns on the

such a construction would contradict "ordinary" rules of vicarious liability, *Meyer*, 537 U.S. at 285, 123 S.Ct. 824, which require courts to consider the interaction between the parties rather than their respective identities. *See* RESTATEMENT (THIRD) OF AGENCY (2006) §§ 2.01, 2.03, 4.01 (explaining that agency may be established by express authorization, implicit authorization, or ratification).

Given Campbell–Ewald's concession that a merchant can be held liable for outsourced telemarketing, it is unclear why a third-party marketing consultant shouldn't be subject to that same liability. As a matter of policy it seems more important to subject the consultant to the consequences of TCPA infraction. After all, a merchant presumably hires a consultant in part due to its expertise in marketing norms. It makes little sense to hold the merchant vicariously liable for a campaign he entrusts to an advertising professional, unless that professional is equally accountable for any resulting TCPA violation. In fact, Campbell–Ewald identifies no case in which a defendant was exempt from liability due to the outsourced transmission of the prohibited calls.

Moreover, our own precedent belies any argument that liability is not possible. In our seminal case regarding text messages and the TCPA, we allowed a case to proceed against an analogous marketing consultant who was not "responsible for the actual transmission of the text messages." *See Satterfield*, 569 F.3d at 951. In *Satterfield*, a publisher had instructed a marketing consultant to create a text

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satisfaction of relevant standards of agency, irrespective of a defendant's nominal designation.

message campaign advertising a new Stephen King novel. *Id.* at 949. The consultant in turn outsourced the recipient selection and message transmission to two other subcontractors. *Id.* A recipient sued both the publisher and the marketing consultant for alleged violations of the TCPA. *Id.* at 950. The district court entered summary judgment in favor of both defendants, holding that the cellular user had consented to receive advertisements when it signed its cellular service contract. *Id.* We ultimately reversed and remanded the case, holding (*inter alia*) that the cellular service agreement did not constitute "express consent" to receive the advertisement in dispute. *Id.* at 955. So although we did not explain the basis of the defendants' potential liability, we implicitly acknowledged the existence of that basis. The present case affords an opportunity to clarify that a defendant may be held vicariously liable for TCPA violations where the plaintiff establishes an agency relationship, as defined by federal common law, between the defendant and a third-party caller.

Before moving on, we should note that Gomez asks us to endorse another potential source of liability by holding that direct liability applies where a third party is "closely involved" in the placing of the calls. Because the facts are not yet developed, the present case does not require such a determination. We therefore leave that question for another day. *See United States v. Manning*, 527 F.3d 828, 837 n. 8 (9th Cir.2008) ("[W]e simply express no view on issues unnecessary to this [decision]." (citation omitted)).

V.

Finally, we turn to the legal theory underlying the district court's decision. The court entered summary

judgment after concluding that Campbell-Ewald is exempt from liability under *Yearsley*, 309 U.S. 18, 60 S.Ct. 413. Gomez contends that *Yearsley* is outdated and inapposite, and that the district court should have applied the standard articulated in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988). The availability of these defenses is a question of law that we review *de novo*. *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1000 (9th Cir.2008).

After reviewing the relevant law, we agree with Gomez that *Yearsley* is not applicable. *Yearsley* established a narrow rule regarding claims arising out of property damage caused by public works projects. The dispute involved erosion caused by efforts to render the Missouri River more navigable. *Yearsley*, 309 U.S. at 19, 60 S.Ct. 413. The Court reasoned that if—as alleged—the contractor's work was in accordance with express Congressional directive and resulted in an unconstitutional taking of property, "the Government has impliedly promised to compensate the plaintiffs and has afforded a remedy for its recovery by a suit in the Court of Claims." *Id.* at 21–22, 60 S.Ct. 413 (citing 28 U.S.C. § 250 (1940)) (other citations omitted). As a consequence, there was an adequate remedy available and no need for action against the private contractor. *Id.* at 22, 60 S.Ct. 413.

It seems clear that the reasoning employed by the *Yearsley* Court is not relevant here. Gomez's claims do not implicate a constitutional "promise to compensate" injured plaintiffs such that an alternate remedy exists. Nor does the case belong in some other venue. *Cf. Myers v. United States*, 323 F.2d 580, 583 (9th Cir.1963) (remanding under *Yearsley* for transfer to Court of

Claims). Instead, Congress has expressly created a federal cause of action affording individuals like Gomez standing to seek compensation for violations of the TCPA. In the seventy-year history of the *Yearsley* doctrine, it has apparently never been invoked to preclude litigation of a dispute like the one before us. This Court, in particular, has rarely allowed use of the defense, and only in the context of property damage resulting from public works projects.

In its brief discussion, the district court did not explain its decision to apply *Yearsley* to the facts and issues at bar. The cases cited by the court do not support such an interpretation.[7] At oral argument, we asked Campbell–Ewald to name any authority that might justify the application of *Yearsley* to the facts of this case. Campbell–Ewald responded by pointing to a recent Fifth Circuit decision dismissing a class action under *Yearsley*. *See Ackerson*, 589 F.3d 196. Yet that case—like *Yearsley* itself—involved allegations of property damage resulting from dredging work undertaken to improve the nation's waterways. *Id.* at 202–03 (listing allegations that the United States and its contractors had irreparably damaged Louisiana's coastline and wetlands in the 1960s, ultimately contributing to the widespread loss of property during Hurricane Katrina). So while the Fifth Circuit's decision may rebut Gomez's argument that *Yearsley* is

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[7] *See Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 204–07 (5th Cir.2009) (applying *Yearsley* in traditional public works context); *Butters v. Vance Int'l Inc.*, 225 F.3d 462, 466 (4th Cir.2000) (adjudicating immunity under the Foreign Sovereign Immunity Act); *Myers*, 323 F.2d at 583 (applying *Yearsley* to property loss resulting from highway construction).

stale precedent, it does not warrant application of the doctrine to the present dispute.

Nor does the *Boyle* pre-emption doctrine provide Campbell–Ewald with a relevant defense. The doctrine precludes state claims where the imposition of liability would undermine or frustrate federal interests. *See Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450, 1454 (9th Cir.1990) (explaining that the *Boyle* standard is used to determine when "federal law should displace state law"). *Boyle* involved a wrongful death action brought under Virginia law against a government contractor that had supplied a helicopter to the United States military. *See* 487 U.S. at 502, 108 S.Ct. 2510. After a jury returned a verdict in favor of the plaintiffs, the Fourth Circuit reversed, holding that liability was precluded in part by the federal interest inherent in military decisions. *Id.* at 503, 510, 108 S.Ct. 2510. The Supreme Court agreed, explaining that when "an area of uniquely federal interest" is implicated by a federal purchase, state law is displaced where "a significant conflict exists between an identifiable federal policy or interest and the operation of state law, or the application of state law would frustrate specific objectives of federal legislation ." *Id.* at 507, 108 S.Ct. 2510 (internal brackets, quotation marks, and citations omitted). The Court then remanded after establishing a rule by which courts should determine whether a specific contractor is acting pursuant to a military contract such that the defense is available. *Id.* at 512, 108 S.Ct. 2510.

Although *Boyle* in effect created a defense for some government contractors, it is fundamentally a pre-emption case. The *Boyle* Court established two related rules: (1) a general rule whereby state claims may be

pre-empted by federal law, and (2) a specific rule whereby certain military contractors may be exempt from state tort liability in furtherance of that pre-emption. 487 U.S. at 507–08, 512, 108 S.Ct. 2510. In arguing that *Boyle* governs here, Gomez overlooks the pre-emption predicate, assuming that *Boyle* represents a general grant of immunity for government contractors. Yet *Boyle* itself includes footnotes emphasizing the displacement question and indicating that it should not be construed as broad immunity precedent. *Id.* at 505 n. 1, 508 n. 3, 108 S.Ct. 2510. We have already clarified this point, explaining that *Boyle* "is directed toward deciding the extent to which federal law should displace state law with respect to the liability of a military contractor." *Nielsen*, 892 F.2d at 1454. Accordingly, although *Boyle* may apply more broadly than to the facts of that case alone, that broader applicability is rooted in pre-emption principles and not in any widely available immunity or defense.

Returning to the present case, Gomez brings a claim under federal law, so pre-emption is simply not an issue. The *Boyle* doctrine is thus rendered inapposite. Even Campbell–Ewald—notwithstanding a vested interest in maintaining every possible means of exoneration—admits that a *Boyle* defense is not permissible here. Because the defendant does not assert a *Boyle* defense, we need not belabor the present discussion—we accept Campbell–Ewald's concession that *Boyle* is not relevant.

Campbell–Ewald contends that a new immunity for service contractors was espoused by the Supreme Court in *Filarsky v. Delia*, — U.S. —, 132 S.Ct. 1657, 182 L.Ed.2d 662 (2012). Yet the Court did not

establish any new theory, and although the *Filarsky* discussion does include a broad reading of the qualified immunity doctrine, *id.* at 1667–68, that doctrine is not implicated by this case. *Filarsky* involved alleged constitutional violations brought pursuant to 42 U.S.C. § 1983. *See id.* at 1661. The Supreme Court granted certiorari to resolve a dispute as to whether one of the defendants—an attorney contracted by municipal government—was eligible for the qualified immunity afforded to his city-employed colleagues. *Id.* at 1660–61. To determine the scope of the doctrine, the Court examined "the 'general principles of tort immunities and defenses' applicable at common law." *Id.* at 1662 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)). When the examination revealed that part-time and lay officials had been granted immunity throughout the nineteenth century, *id.* at 1665, the Court concluded that the contractor was properly entitled to the same qualified immunity enjoyed by his publicly employed counterparts.

Filarsky has little to offer Campbell–Ewald. The decision is applicable only in the context of § 1983 qualified immunity from personal tort liability. *See, e.g., ibid.* ("[I]mmunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis."). Moreover, the Court afforded immunity only after tracing two hundred years of precedent. Here, not only do we lack decades or centuries of common law recognition of the proffered defense, we are aware of *no* authority exempting a marketing consultant from analogous federal tort liability.

Nor are we persuaded that we should establish the novel immunity asserted by defendants. As the Supreme Court has recognized, immunity "comes at a great cost." *Westfall v. Erwin*, 484 U.S. 292, 295, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988), *superseded by statute on other grounds*, Pub.L. No. 100–694, 102 Stat. 4563 (1988), codified at 28 U.S.C. § 2679(d), *as recognized in Adams v. United States*, 420 F.3d 1049, 1052 (9th Cir.2005). Where immunity lies, "[a]n injured party with an otherwise meritorious tort claim is denied compensation," which "contravenes the basic tenet that individuals be held accountable for their wrongful conduct." *Westfall*, 484 U.S. at 295, 108 S.Ct. 580. Accordingly, immunity must be extended with the utmost care. The record contains sufficient evidence that the text messages were contrary to the Navy's policy permitting texts only to persons who had opted in to receive them. Consequently, we decline the invitation to craft a new immunity doctrine or extend an existing one.

VI.

As explained herein, Campbell–Ewald's four arguments in support of summary judgment each fail. And because the motion was based on pure questions of law, we were not briefed on the factual predicates of liability. Campbell–Ewald has therefore not carried its burden to demonstrate an absence of material fact or to show that it is otherwise "entitled to judgment as a matter of law." FED.R.CIV.P. 56(a). Accordingly, we VACATE the district court's order and remand the case for further proceedings consistent with this opinion.

VACATED and REMANDED.

The costs shall be taxed against the Defendant–Appellee.

UNITED STATES DISTRICT COURT, C.D. CALIFORNIA

Jose GOMEZ, Plaintiff,

v.

CAMPBELL–EWALD COMPANY, Defendant.

No. CV 10–02007 DMG (CWx).

Feb. 22, 2013.

2013 WL 655237

ORDER RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR JUDGMENT ON THE PLEADINGS

DOLLY M. GEE, District Judge.

This matter is before the Court on Defendant Campbell–Ewald Company's ("C–E") motion for summary judgment [Doc. # 115] and motion for judgment on the pleadings [Doc. # 130]. The Court held a hearing on March 30, 2012. For the reasons set forth below, Defendant's motion for summary judgment is GRANTED and motion for judgment on the pleadings is DENIED.

I.

PROCEDURAL HISTORY

On March 19, 2010, Plaintiff filed a class action complaint in this Court alleging a single cause of action for violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* ("TCPA").

Defendant filed a motion for summary judgment on October 18, 2011. Plaintiff filed an opposition on October 25, 2011 and a supplemental opposition on March 5, 2012. Defendant filed a reply on March 19,

2012. The parties filed supplemental briefs following the hearing. [Doc.218–220, 223, 225–227, 229.]

Defendant filed a motion for judgment on the pleadings on November 7, 2011. Plaintiff filed an opposition on October 14, 2011. Defendant filed a reply on November 21, 2011.

II.

FACTUAL BACKGROUND

As it must on this motion for summary judgment, the Court sets forth the material undisputed facts and views all reasonable inferences to be drawn from them in the light most favorable to Plaintiff, the non-moving party.

C–E is a global advertising agency that provides marketing services to clients throughout the United States, including the United States Navy. (Declaration of Daniel Rioux ("Rioux Decl.") ¶ 1.) C–E is the Navy's advertising agent of record. (Declaration of Lee Buchschacher ("Buchschacher Decl.") ¶ 3.) Beginning in 2000, C–E contracted with the Navy to assist it in achieving its recruitment goals. (*Id.* ¶¶ 3–4; Rioux Decl. ¶ 3.) Navy Recruiting Command ("NRC") is the recruiting arm of the Navy that is devoted solely to Naval recruitment efforts. (Buchschacher Decl. ¶ 2.)

C–E entered into its first base or master contract with the Navy in September 2000 (the "2000 Base Contract"). (Auger Decl. ¶ 3.) The 2000 Base Contract provides as follows:

> Services to be performed include *all* advertising-related services, directly prescribed by the Contracting Officer or proposed by the contractor and approved for implementation by the Contracting Officer. In all instances, the Commander Navy

> Recruiting Command (CNRC) holds the ultimate right of approval for all deliverables under this contract.

(Auger Decl. ¶ 3, Ex. 1; emphasis in original [Doc. # 212 at 22] .)

On September 21, 2005, C–E and the Navy executed order "VJBB" pursuant to the Navy's request and authorization for C–E to acquire additional media under the 2000 Base Contract for the purpose of supporting the Navy's recruitment efforts in 2006. (Auger Decl. ¶ 5; Rioux Decl. ¶ 4, Ex. 1.) On September 27, 2005, C–E and the Navy executed an amendment to the VJBB Order that authorized an increase in funds for the additional media requested by the Navy. (Auger Decl. ¶ 6; Rioux ¶ 5, Ex. 2.)

On or about December 16, 2005, C–E submitted a proposed media plan, as requested by the Navy. (Auger Decl. ¶ 7; Buchschacher Decl. ¶ 6, Ex. 2.) Among the various media was Exploratory Media, which included an option for "Wireless/Mobile Marketing to Expand on Navy's Direct Response efforts via SMS [text messaging] and WAP [wireless application protocol]." (Buchschacher Decl. ¶ 6, Ex. 2 at 15.) Fleet Industrial Supply Center ("FISC"), the Navy's contracting administrator, and NRC approved the wireless/mobile marketing option for 2006. (*Id.* Ex. 2 at 2.)

On January 4, 2006, a second amendment was made to the VJBB Order under the 2000 Base Con-tract in order to incorporate the December 16, 2005 media plan. (Auger Decl. ¶ 8; Rioux Decl. ¶ 5, Exs. 2–4.) The amendment included funds for "exploratory media" pursuant to that 2005 plan and provided that all media

placement was to be completed on or before August 19, 2006. (Auger Decl. ¶ 8.)

On February 13, 2006, C–E issued a request for proposal for "executing wireless advertising from April–June, 2006 on behalf of [its] client, the United States Navy." (Rioux Decl. ¶ 7, Ex. 5.) The goal of the 2006 wireless strategy was to "recruit nearly 38,000 Active Duty, General Enlisted sailors," with the "[p]rimary target [being] male, 17-1/2 to 24 year[ ] old students; already in the workforce secondary." (*Id.*)

In response to C–E's request for proposals, MindMatics LLC submitted proposals dated February 22, 2006 and April 2, 2006. (Rioux Decl. ¶ 8, Exs. 6–7.) On March 17, 2006, C–E gave a PowerPoint presentation to NRC entitled "Navy 2006 Wireless/Mobile Tactical Media recommendations," which outlined "Exploratory Media" options consistent with the Navy's goals. (Rioux Decl. ¶ 10, Ex. 8; Buchschacher Decl. ¶ 8, Ex. 3.) The 2006 presentation included a text message proposal from MindMatics to deliver a "Navy branded SMS (text) direct mobile 'push' program to the cell phones of 150,000 Adults 18–24 from an opt-in list of over 3 million." (Buchscahcher Decl. ¶ 9, Ex. 3.) CE was required to obtain NRC approval to proceed. (*Id.*)

The NRC "worked closely with C–E on the Navy's May 2006 text message recruiting campaign, and provided Navy oversight and approval. (*Id.* ¶ 11.) Lee Buchschacher, as the Deputy Director, Marketing and Advertising Plans Division, for the NRC and Cornell Galloway, an Enlisted Program Advertising Manager, "authorized and approved the text message campaign proposed by MindMatics on behalf of NRC." (*Id.* ¶ 12; Rioux Decl. ¶ 12.) Buchschacher "also reviewed,

revised, and approved the creative for the Navy's text message." (Buchschacher Decl. ¶ 12, Exs. 4–5; Rioux Decl. ¶ 12, Ex. 9) The Navy approved the following message to potential Naval recruits:

> Destined for something big? Do it in the navy. Get a career.
>
> An education. And a chance to serve a greater cause. For a FREE Navy video call 1–800–510–2074.

(Buchscahcher Decl. ¶ 12, Ex. 5; Rioux Decl. ¶ 12, Ex. 9.)

Between May 10 and May 24, 2006, text messages were sent by MindMatics to potential Naval recruits between the ages of 18 and 24. (Rioux Decl. ¶ 13.) C–E did not send the text messages and never saw or took possession of the mobile numbers used for the Navy's text message campaign. (Rioux Decl. ¶ 13.) Instead, MindMatics handled the deployment, transmission and delivery of the text messages, including the use of its own SMS short code. (Rioux ¶ 13, Ex. 10.)

Plaintiff received a text message from SMS shortcode 43704 on May 10, 2006. (Reilly Decl. ¶ 6, Ex. 5; Gomez Depo. at 35, Ex. 1.)

III.
C–E'S MOTION FOR JUDGMENT ON THE PLEADINGS[1]

In its motion for judgment on the pleadings, Defendant contends that Plaintiff's claim is time-barred by an Illinois two-year statute of limitations because Plaintiff filed his complaint almost four years after he received the allegedly unlawful text message at issue in this case. The crux of Defendant's position is that Congress intended for courts to apply state law to TCPA claims and, therefore, the state statute of limitations applies to such claims.

Since the time that Defendant filed its motion, however, the United States Supreme Court issued its decision in *Mims v. Arrow Financial Services, LLC*, — U.S. —, 132 S.Ct. 740, 181 L.Ed.2d 881 (2012). In *Mims*, the Supreme Court clarified that federal and

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[1] Judgment on the pleadings is properly granted only when, taking all the factual allegations in the pleadings as true, "the moving party is entitled to judgment as a matter of law." *Dunlap v. Credit Protection Ass'n*, L.P., 419 F.3d 1011, 1012 n. 1 (9th Cir.2005) (*per curiam*) (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir.2001)) (quotation marks omitted). A court must construe the factual allegations in the pleadings in the light most favorable to the non-moving party. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir.2009) (citing *Turner v. Cook*, 362 F.3d 1219, 1225 (9th Cir.2004)). Thus, motions under Rule 12(c) are "functionally identical" to motions under Rule 12(b). *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir.1989). Upon granting a motion for judgment on the pleadings, a court should grant leave to amend unless it "determines that the pleading could not possibly be cured by the allegation of other facts." *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir.2009) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir.2000) (*en banc*)) (quotation marks omitted).

state courts have concurrent jurisdiction over private suits arising under the TCPA *and* uniform application. The Supreme Court also noted that, in enacting the TCPA, Congress "enacted detailed, uniform, federal substantive prescriptions and provided for a regulatory regime administered by a federal agency" and that "TCPA liability thus depends on violation of a federal statutory requirement or an FCC regulation, §§ 227(b)(3)(A), (c)(5), not on a violation of any state substantive law." *Id.* at 751.

In light of the Supreme Court's ruling in *Mims* that the TCPA is intended to have uniform application, the Court finds that the four-year statute of limitations in 28 U.S.C. § 1658 applies to TCPA claims.[2]

The Court therefore denies Defendant's motion for judgment on the pleadings.

IV.

C–E'S MOTION FOR SUMMARY JUDGMENT

A. *Legal Standard*

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to

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[2] The federal "catchall" limitations statute, 28 U.S.C. § 1658 provides that:

> Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

28 U.S.C. § 1658. A cause of action is governed by 28 U.S.C. § 1658 "if the plaintiff's claim against the defendant was made possible by a post–1990 enactment." *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369, 382, 124 S.Ct. 1836, 158 L.Ed.2d 645 (2004). The TCPA was enacted in 1991.

judgment as a matter of law." Fed.R.Civ.P. 56(a); *accord Wash. Mut. Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir.2011). Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Partial summary judgment may be sought on any claim or defense, or part thereof, and the court may grant less than all of the relief requested by the motion. *See* Fed.R.Civ.P. 56(a), (g).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has met its initial burden, Rule 56(c) requires the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed.R.Civ.P. 56(c), (e) (1986)); *see also Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir.2010) (*en banc*) ("Rule 56 requires the parties to set out facts they will be able to prove at trial."). "[T]he inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

B. ***Discussion***

Gomez alleges a single cause of action for violation of the TCPA. C–E contends, *inter alia*, that Gomez's claim fails as a matter of law because, insofar as the

Navy is immune from liability under the TCPA, C–E is also immune as a result of derivative sovereign immunity.

Because the United States cannot be sued without the consent of Congress, *Block v. North Dakota ex rel. Bd. Of Univ. & Sch. Lands*, 461 U.S. 273, 287, 103 S.Ct. 1811, 75 L.Ed. 840 (1983), and Congress did not consent to TCPA suits against the federal government, 47 U.S.C. § 227(b)(1), the Navy cannot be sued for violation of the TCPA. Indeed, "[s]overeign immunity is jurisdictional in nature. *FCIC v. Meyer*, 510 U.S. 471, 475, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). "[W]aiver of [immunity] must be unequivocally expressed in statutory text and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486, ——, 135 L.Ed. 486 (1996).

Inasmuch as C–E acted on behalf of the Navy, it is also immune under the doctrine of derivative sovereign immunity established by the Supreme Court in *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21–22, 60 S.Ct. 413, 84 L.Ed. 554 (1940). In *Yearsley*, the Supreme Court held that, "if [the] authority to carry out the project was validly conferred ... there is no liability on the part of the contractor for executing [the Government's] will." 309 U.S. at 20–21. An agent is liable only if "he exceeded his authority or that [the authority] was not validly conferred." *Id.* at 21; *see also Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir.2000) (it is "well-settled law that contractors and common law agents acting within the scope of their employment for the United States have derivative sovereign immunity").

Gomez does not contend disagree that the Navy is immune. Instead, citing to the Ninth Circuit's decision

in *In re Hawaii Fed. Asbestos Cases*, 960 F.2d 806 (9th Cir.1992), Gomez takes the position that C–E must meet the five-factor test established in the later decision *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), in which the Supreme Court applied the concept of derivative sovereign immunity to military contractors. (Pl.'s Opp'n at 4; citing *In re Hawaii*, 960 F.2d at 811.)

Gomez's reliance on *Boyle* and *In re Hawaii* is misplaced. In fact, the Ninth Circuit could not have been more explicit in *In re Hawaii* that the military contractor defense outlined in *Boyle* applies to the specific situation in which a contractor produces military equipment for the Government.[3] "The *Boyle* Court repeatedly described the military contractor defense in terms limiting it to those who supply military equipment to the government." *In re Hawaii*, 960 F.2d at 810 (citing *Boyle*, 487 U.S. at 512)). "The fact that the military may order such products does not make them 'military equipment.'" *Id.* at 811. Rather, the limitation of liability "only with respect to the military equipment they produce for the United States is consistent with the purposes the Court ascribes to that defense" and that those "same concerns do not

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[3] The military contractor defense set forth in *Boyle* "immunizes contractors who supply military equipment to the government from the duties imposed by state tort law" and prohibits the imposition of liability when "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *In re Hawaii*, 960 F.2d at 810 (citing *Boyle*, 487 U.S. at 512).

exist in respect to products readily available on the commercial market." *Id.* at 811.

Gomez addresses *Yearsley's* applicability to this case in a single footnote and points to no evidence indicating that C–E exceeded the scope of its authority to send the text message at issue. Instead, relying on *In re Hanford*, 534 F.3d 986 (9th Cir.2007), Gomez contends that *Yearsley* is limited to "principal-agent relationships where the agent had no discretion in the design process and completely followed government specifications," *id.* at 1001, and that, in any event, C–E was not acting as the Navy's agent. (Pl.'s Opp'n at 4 n. 1.)

Gomez's reliance on *In re Hanford* is equally unavailing. The issue before the court in *In re Hanford* was whether the Price Anderson Act preempted reliance on the common law doctrine of derivative sovereign immunity. In its analysis, the Ninth Circuit interpreted *Yearsley* as limiting "the applicability of the defense to principal-agent relationships where the agent had no discretion in the design process and completely followed government specifications." *In re Hanford*, 534 F.3d at 1001.

Yet, *Yearsley* does not preclude contractors such as C–E from invoking derivative immunity. *See* 309 U.S. at 20–21 ("if [the] authority to carry out the project was validly conferred there is no liability on the part of the contractor for executing [the Government's] will"); *see also Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 205 (5th Cir.2009) ("*Yearsley* does not use the word 'agent' but also uses 'contractor' and 'representative"). *Yearsley* did not at all examine the contractor's relationship with the government to determine whether there was an agency relationship

and the Ninth Circuit applied *Yearsley* without any discussion of an agency relationship in *Myers v. U.S.*, 323 F.2d 580, 583 (9th Cir.1963). *See Ackerson*, 589 F.3d at 206 (cataloging federal court decisions applying *Yearsley* without an agency relationship analysis).

The Fourth Circuit has similarly recognized that "courts define the scope of sovereign immunity by the nature of the function being performed-not by the office or the position of the particular employee involved." *Butters*, 225 F.3d at 466 ("As a result, courts have extended derivative immunity to private contracts, particularly in light of the government's unquestioned need to delegate governmental functions").

Here, it is undisputed that the Navy contracted with C–E to obtain advertising-related services, subject to ultimate approval by the NRC. That 2000 Base Contract was later amended in order to include advertising to support the Navy's recruitment efforts and included an option for wireless marketing. Pursuant to those agreements, C–E acted at the Navy's direction to effectuate a text message recruitment campaign. C–E presents uncontroverted evidence in which the Navy states unequivocally that it "worked closely with C–E on the Navy's May 2006 text message recruiting campaign, and provided Navy oversight and approval. (Buchschacher Decl. ¶ 11.) The Navy "also reviewed, revised, and approved the creative [sic] for the Navy's text message." (Buchschacher Decl. ¶ 12, Exs. 4–5; Rioux Decl. ¶ 12, Ex. 9.)

As such, the Court finds that Gomez's claim for violation of the TCPA fails as a matter of law. Acting as a Navy contractor, C–E is immune from liability

under the doctrine of derivative sovereign immunity. The Court grants C–E's motion for summary judgment. Given the Court's ruling, the Court need not address C–E's remaining grounds for its motion.

V.

CONCLUSION

In light of the foregoing, C–E's motion for summary judgment is **GRANTED** and its motion for judgment on the pleadings is **DENIED**.

IT IS SO ORDERED.

JUDGMENT

Pursuant to the Court's February 22, 2013 Order re Defendant's Motion for Summary Judgment, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that judgment is entered in favor of Defendant Campbell–Ewald Company and against Plaintiff Jose Gomez, who shall take nothing.

UNITED STATES DISTRICT COURT,
C.D. CALIFORNIA

Jose GOMEZ, individually and on behalf of a class of similarly situated individuals, Plaintiff,

v.

CAMPBELL–EWALD COMPANY, a Delaware corporation, Defendant.

Case No. CV 10–2007 DMG (CWx).

April 8, 2011.

805 F. Supp. 2d 923

ORDER RE: (1) PLAINTIFF'S MOTION TO STRIKE [Doc. # 32]; (2) PLAINTIFF'S MOTION FOR CLASS CERTIFICATION [Doc. # 33]; AND (3) DEFENDANT'S MOTION TO DISMISS [Doc. # 47]

DOLLY M. GEE, District Judge.

This matter is before the Court on the following: (1) Plaintiff's motion to strike [Doc. # 32]; (2) Plaintiff's motion for class certification [Doc. # 33]; and (3) Defendant's motion to dismiss [Doc. # 47]. The Court held a hearing on April 8, 2011. Having duly considered the respective positions of the parties, as presented in their briefs and at oral argument, the Court now renders its decision. For the reasons set forth below, Defendant's motion to dismiss is DENIED, Plaintiff's motion to strike is GRANTED, and the Court defers its ruling on Plaintiff's motion for class certification until after the parties have completed class discovery.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Plaintiff's Claim*

On March 19, 2010, Plaintiff filed a class action complaint in this Court alleging violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* ("TCPA"). (Compl. ¶ 20.) According to Plaintiff, beginning in at least 2006, Defendant directed the mass transmission of wireless spam to the cellular telephones of consumers across the nation to advertise on behalf of the U.S. Navy. (Compl. ¶ 14.)

On or about May 11, 2006, Plaintiff received the following text message on his cellular phone:

> DESTINED FOR SOMETHING BIG? DO IT IN THE NAVY. GET A CAREER. AN EDUCATION. AND A CHANCE TO SERVE A GREATER CAUSE. FOR A FREE NAVY VIDEO CALL 1–800–510–2074.

(*Id.* ¶ 16; emphasis in original). Plaintiff received additional text message advertisements over the next several months and never consented to the receipt of such text message calls from Defendant. (*Id.* ¶¶ 18–19.)

Plaintiff seeks $500 in damages for each purported TCPA violation, as well as treble damages, injunctive relief, and an award of reasonable attorneys' fees and costs. (*Id.* ¶¶ 30-31.) Plaintiff seeks to certify a nationwide class of "thousands" consisting of "all persons in the United States and its Territories who received one or more unauthorized text message advertisements from Defendant." (*Id.* ¶¶ 20–21.)

B. *The Parties' Stipulation*

Pursuant to Local Rule 23–3, Plaintiff's motion for class certification was originally due to be filed on or before June 17, 2010.

On May 18–19, 2010, counsel for the parties conferred regarding Defendant's motion to dismiss. (Decl. of Michael J. McMorrow in Supp. Reply ("McMorrow MTD Decl.") ¶¶ 2–3.) In response to Plaintiff's counsel's request for additional time to respond to Defendant's motion, Defendant's counsel stated, "we are amenable to a change in the hearing date as long as you agree not to initiate discovery until after the motion is decided." (McMorrow MTD Decl. ¶ 3, Ex. 1.)

On June 2, 2010, the parties filed a stipulation (the "Stipulation") by which the parties agreed that the deadline for Plaintiff to file his motion for class certification should be extended. [Doc. # 9.] Plaintiff wished to wait for Defendant to answer or otherwise respond to the Complaint, and to conduct pre-certification discovery, before filing his motion for class certification. Defendant agreed that it would be "inefficient for the Court and the parties to expend resources on class certification-related activities before Defendant has responded to the Complaint and before any threshold motions are resolved and the pleadings are more settled." (Stipulation at 2.)

The parties therefore stipulated that:

> Following disposition of Defendant's responsive pleadings, the Parties, if necessary, anticipate presenting a proposed discovery schedule to the Court setting forth the deadlines and requirements associated with the parties' Rule 26(f) conference and report.

(*Id.*) On June 3, 2010, the Court approved the Stipulation and extended Plaintiff's deadline to file his motion for class certification "until after all Parties have answered and presented a proposed discovery schedule to the Court setting forth the deadlines and requirements associated with the parties' Rule 26(f) conference and report." [Doc. # 10.]

On May 19, 2010, Defendant filed its first motion to dismiss, which the Court denied on November 5, 2010. On November 19, 2010, Defendant filed its Answer. On November 22, 2010, Defendant filed a motion for reconsideration of its motion to dismiss, which the Court denied on December 9, 2010. On January 19, 2011, Plaintiff filed his motion for class certification. On February 1, 2011, the Court issued its Scheduling and Case Management Order.

C. *Defendant's Rule 68 Offer and Offer of Settlement*

On January 5, 2011, Defendant filed a notice of offer of judgment pursuant to Fed. R. Civ. P. 68 (the "Rule 68 Offer").[1] [Doc. # 31.] Defendant offered to allow judgment to be entered against it in this action (1) in the amount of $1503 for each unsolicited text message that Plaintiff alleged received from or on behalf of Defendant (which represented $501 trebled as requested by Plaintiff in the Complaint), (2) to pay any

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[1] Rule 68 of the Federal Rules of Civil Procedure permits a defendant to "offer to allow judgment" at least 14 days before the date set for trial. Fed.R.Civ.P. 68(a). "If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment." *Id.* "An unaccepted offer is considered withdrawn." Fed.R.Civ.P. 68(b).

and all reasonable costs incurred by Plaintiff or his attorneys in the action, and (3) to allow the Court to enter an injunction against it. (Rule 68 Offer at 1.)

On January 5, 2011, Defendant also made a settlement offer to Plaintiff (the "Settlement Offer"). Defendant offered "to resolve all claims which [Plaintiff] has or had against [Defendant] arising from or related to any unsolicited text messages that were allegedly sent by or on behalf of [Defendant] to [Plaintiff] between March 19, 2006, and the present." (Decl. of Laura A. Wytsma ("Wytsma Decl.") ¶ 6, Ex. 5.) In the Settlement Offer, Defendant offered to: (1) pay Plaintiff the sum of $1503 for each and every unsolicited text message that was allegedly sent by or on behalf of Defendant to any cell phone owned by Plaintiff; (2) pay Plaintiff any costs that he would recover if he were to prevail in the action; and (3) agree to a stipulated injunction prohibiting it from the alleged "wireless spam activities." (*Id.*)

On January 19, 2010, Plaintiff filed a (1) motion to strike and quash Defendant's Rule 68 Offer [Doc. # 32] and a(2) motion for class certification [Doc. # 33]. On March 11, 2011, Defendant filed an opposition to Plaintiff's motion to strike, an opposition to Plaintiff's motion for class certification, and a second motion to dismiss [Doc. # 47]. On March 25, 2011, Plaintiff filed a reply in support of his motion to strike, a reply in support of his motion for class certification, and an opposition to Defendant's second motion to dismiss. On April 1, 2011, Defendant filed a reply in support of its second motion to dismiss.

II.

DEFENDANT'S MOTION TO DISMISS[2]

The parties do not dispute that Defendant's Rule 68 Offer would have fully satisfied the individual claims asserted, or that could have been asserted, by Plaintiff in this action.[3] The parties also do not dispute that an offer of judgment cannot moot a case once a class has been certified. The question before the Court is whether an offer of judgment made to a named plaintiff *prior* to class certification moots a putative class action.

Defendant contends that the Rule 68 Offer moots Plaintiff's claim because Plaintiff has "won" and there is no longer anything left for this Court to adjudicate. Plaintiff argues that the Rule 68 Offer is an improper attempt to "pick off" Plaintiff's claim because he had no opportunity to file a class certification motion prior to such offer.

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[2] As Defendant has already filed an Answer, it cannot raise its mootness arguments by way of a motion under Fed.R.Civ.P. 12(b)(1). *See* Fed.R.Civ.P. 12(b). As Defendant has presented matters outside of the pleadings and Plaintiff has not objected, the Court construes Defendant's motion as one for summary judgment. *Id.* at 12(d).

[3] Rule 68 of the Federal Rules of Civil Procedure permits a defendant to "offer to allow judgment" at least 14 days before the date set for trial. Fed.R.Civ.P. 68(a). "If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment." *Id.* "An unaccepted offer is considered withdrawn." Fed.R.Civ.P. 68(b).

A. *Mootness Under Article III of the U.S. Constitution*

Article III of the Constitution limits federal subject matter jurisdiction to "cases and controversies." U.S. Const. art. III § 2; *United States Parole Commission v. Geraghty*, 445 U.S. 388, 395, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980); *see also Rosemere Neighborhood Ass'n v. U.S. Environmental Protection Agency*, 581 F.3d 1169, 1172-73 (9th Cir. 2009).

A case is moot when (1) "the issues presented are no longer live" or (2) the parties lack a "legally cognizable interest in the outcome." *Geraghty*, 445 U.S. at 396, 100 S.Ct. 1202 (internal quotations omitted). The "personal stake" requirement assures that the Court is presented with a dispute it is capable of resolving. *Id.* at 397, 100 S.Ct. 1202. "The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Id.* (internal quotations omitted).

In the class action context, the Supreme Court has permitted named plaintiffs whose individual claims were mooted to appeal a denial of class certification. *Geraghty, supra*, 445 U.S. 388, 100 S.Ct. 1202; *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980). Applying a "relation back" approach, the Supreme Court held that such named plaintiffs who had a personal stake at the inception of the action may continue to litigate the class certification issue on appeal in these circumstances: (1) where the claim is "capable of repetition yet evading review"; and (2) where the claim is so "inherently transitory" that the trial court will not have enough time to rule on a motion for class certification before

the proposed named plaintiff's individual interest expires. *Geraghty*, 445 U.S. at 398-99, 100 S.Ct. 1202.

B. *Whether A Rule 68 Offer of Judgment Moots Plaintiff's Class Claims*

The parties in this case debate whether the rationale animating the *Geraghty* and *Roper* decisions may be extended to a situation, as here, where an offer of judgment under Fed.R.Civ.P. 68 is conveyed *prior to* the filing of a class certification motion. Neither the Ninth Circuit nor the U.S. Supreme Court has squarely addressed whether an involuntary offer of judgment pursuant to Fed.R.Civ.P. 68 made prior to a class certification motion moots the named plaintiff's claims. *See Clausen Law Firm, PLLC v. Nat'l Academy of Continuing Legal Education*, ___ F.Supp.2d ___, 2010 WL 4396433 (W.D.Wash. Nov. 2, 2010).

Under the "relation back" doctrine, the Court considers a motion for class certification as "relating back" to the time the original class complaint was filed so that the named plaintiff retains standing to litigate the action even though his or her individual claims may otherwise have become moot. *See Sosna v. Iowa*, 419 U.S. 393, 402 n. 11, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975); *see also Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir.1997).

The Court has surveyed the legal landscape with regard to the application of the relation back doctrine. Although there is no Ninth Circuit decision directly on point, the Ninth Circuit has provided hints in other analogous contexts as to how it might approach the issue. In *Smith v. T–Mobile USA, Inc.*, 570 F.3d 1119 (9th Cir.2009), the Ninth Circuit held that because the plaintiffs *voluntarily* settled all of their FLSA claims after the district court's denial of class certification, the plaintiffs failed to retain a personal stake in the

litigation and their claims were moot. *See Smith*, 570 F.3d at 1123. The court highlighted the term "voluntarily," in the following note:

> We use the term 'voluntarily' here to contrast a situation where a defendant purposefully makes an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure and tenders the full amount of a named plaintiff's personal claims before the plaintiff can move for certification, as in *Sandoz v. Cingular Wireless, LLC*, 553 F.3d 913, 917–19 (5th Cir.2008).

Id. at 1121 n. 2. In *Narouz v. Charter Communications, LLC*, 591 F.3d 1261 (9th Cir. 2010), the Ninth Circuit went further to hold that even when a named plaintiff *voluntarily* settles his or her individual claims, but specifically retains a personal stake, the plaintiff may appeal the denial of class certification. *See Narouz*, 591 F.3d at 1264 (noting that in order to retain the requisite "personal stake," a class representative "cannot release any and all interests he or she may have had in class representation through a private settlement agreement").

The Third, Fifth, and Tenth Circuits have applied the Supreme Court's "relation back" approach to find that unaccepted offers of judgment will *not* moot a class action for monetary relief where such offer was received before the court could reasonably be expected to rule on the named plaintiff's class certification motion.[4] *See, e.g., Lucero v. Bureau of Collection*

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[4] While the Seventh Circuit has recognized exceptions to the general rule that precludes a person from litigating a class action after his personal claim is extinguished, *i.e.*, the inherently transitory claim and the claim "capable of repetition ... but evading review," (*see, e.g., Wrightsell v. Cook County, Illinois*, 599

Recovery, Inc., 639 F.3d 1239, 1249 (10th Cir.2011) (finding a "nascent interest" attaches to the proposed class upon the filing of a class complaint such that a rejected offer made to a named plaintiff does not render the case moot under Article III); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920 (5th Cir.2008) (applying relation back doctrine in the context of the section 216(b) of the Fair Labor Standards Act ("FLSA") when the FLSA plaintiff files a timely motion for certification of a collective action); *Weiss v. Regal Collections*, 385 F.3d 337, 347–48 (3d Cir.2004) (applying relation back doctrine in the context of the Fair Debt Collection Practices Act ("FDCPA") where defendant made a Rule 68 offer before the plaintiff had a reasonable opportunity to move for class certification).

In this case, Defendant argues that because Plaintiff "does not seek to *appeal* a denial of class certification but instead seeks to obtain a new ruling on the class certification issue," the "relation back" doctrine is inapplicable. (Def.'s Reply at 4.) Defendant argues that *Weiss* and *Sandoz* inappropriately extended the Supreme Court's decisions in *Roper* and *Geraghty* beyond the narrow procedural posture of those cases, *i.e.*, appeals of adverse class certification rulings in cases where one of the two exceptions—"capable of repetition" and "inherently transitory"—applies.

F.3d 781 (7th Cir.2010)), it has also held that the plaintiff cannot benefit from an exception to the mootness doctrine because the plaintiff did not move for class certification prior to the evaporation of his personal stake (*see Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir.1994)).

In support of its position, Defendant relies primarily on *Lusardi v. Xerox Corp.*, 975 F.2d 964 (3d Cir.1992), where the Third Circuit held that the named plaintiffs, who voluntarily settled their case after eight years, no longer retained the requisite personal stake under Article III to pursue class certification. Defendant's reliance on *Lusardi* is misplaced. In *Lusardi*, the named plaintiffs settled their individual claims before filing their motion to certify subclasses. Noting that there was a decision on the merits of class certification "not once but twice," the court determined that "this simply was not a case where the trial court lacked a reasonable opportunity to rule on the merits of class certification or where the class-action defendant successfully prevented effective resolution of a class certification issue." *Id.* at 983.

Indeed, in *Weiss*, a decision issued twelve years after *Lusardi*, the Third Circuit relied on *Roper* and *Geraghty* to find that the relation back doctrine *should* apply where the defendant made a Rule 68 offer before the court had "a reasonable opportunity" to consider class certification. *Weiss*, 385 F.3d at 346. Acknowledging that its decision created tension with its prior *Lusardi* decision, the court noted that the *Lusardi* plaintiffs *voluntarily* settled their claims before moving for class certification. *Id.* at 349. In contrast, because the *Weiss* defendant's "unilateral action" was used to "thwart" the putative class action before the certification question could be decided, the "'picking off scenarios described by the Supreme Court in *Roper* [were] directly implicated.'" *Id.* The court remanded the action to the district court to allow the plaintiff to file a motion for class certification.

The Sixth Circuit's decision in *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir.1993), is similarly

inapposite. There, because the plaintiffs accepted the defendant's settlement offer before the class certification motion was filed, the court found that the named plaintiffs did not have a "personal stake" at the time the district court certified the class. *Id.* at 400. The court noted that their claims were not mooted by the defendant's settlement offer or by the court's order, but rather, by their agreement to accept the defendant's offer. *Id.*

Defendant cites two District Court decisions, *Russell v. United States*, 2009 WL 4050938 (N.D.Cal. Nov. 20, 2009) and *Ptasinska v. U.S. Department of State*, 2008 WL 294907 (N.D.Ill. Jan. 31, 2008), which are equally unconvincing. The *Russell* court, in fact, distinguished its case from *Weiss* because "the United States did not seek to pick off a single plaintiff by offering an individual settlement to plaintiff." *Russell*, 2009 WL 4050938 at *5. Instead, the United States audited more than 170,000 accounts and issued refunds to approximately 59,000 customers, including the named plaintiff. The court therefore noted:

> Here, the United States, if it has picked off anything, has picked off an entire lawsuit and not just an individual plaintiff. The concerns of an involuntary settlement being used to thwart a class action are not present under these circumstances.

Id. While the *Ptasinska* court read *Roper* narrowly to find that the named plaintiff's claims were moot because her claims were resolved before she sought class certification, *Ptasinska* is an unpublished decision from a district court outside of this Circuit and not binding on this Court.

This Court rejects the notion that Defendant can make an end-run around a class action simply by virtue of a facile procedural "gotcha," *i.e.*, the conveyance of a

Rule 68 offer of judgment to "pick off" the named plaintiff prior to the filing of a class certification motion. The Court finds that the relation back doctrine is the proper approach in this context and next considers whether it should be applied under the particular facts of this case.

C. ***The "Relation Back" Doctrine Should be Applied in this Case***

1. **Plaintiff Was Not Dilatory In Filing His Motion for Class Certification**

In this case, Defendant asked Plaintiff to agree not to initiate discovery while its first motion to dismiss was pending (McMorrow Decl. ¶ 3, Ex. 1) and agreed that it would be "inefficient for the Court and the parties to expend resources on class certification-related activities before Defendant has responded to the Complaint and before any threshold motions are resolved and the pleadings are more settled" (Stipulation at 2). In the Stipulation, Plaintiff stated that he "wishe[d] to wait for Defendant Campbell-Ewald to answer or otherwise respond to the Complaint, and to conduct pre-certification discovery, before filing his motion for class certification." (Stipulation at 2.) As a result of the parties' agreement, the Court extended Plaintiff's deadline to file his motion for class certification "until after all Parties have answered and presented a proposed discovery schedule to the Court setting forth the deadlines and requirements associated with the parties' Rule 26(f) conference and report." [Doc. # 10.]

Plaintiff therefore maintains that he had no reasonable opportunity to move for class certification because (1) the Court denied Defendant's first motion to dismiss on November 5, 2010, (2) the Court denied Defendant's motion for reconsideration on December 9,

2010, (3) on December 17, 2010, the Court set a scheduling conference for February 7, 2010, and (4) Defendant made its Rule 68 Offer on January 5, 2011. Plaintiff contends that even if he had moved for class certification without discovery, he still would have had to comply with Local Rule 7–3's meet and confer requirement, which would have invited Defendant to immediately make a Rule 68 offer of judgment.

By the time Defendant filed its offer of judgment on January 5, 2011, just one month had passed since the time the Court denied Defendant's motion for reconsideration on their first motion to dismiss. Plaintiff filed his motion for class certification, albeit without the benefit of discovery, within two months after Defendant filed its Answer. Under these circumstances, the Court does not find that Plaintiff was dilatory in filing his motion for class certification.

2. Allowing Plaintiff's Class Claim to Proceed Furthers The Policies Underlying Fed.R.Civ.P. 23

Defendant contends that Congress did not intend for TCPA claims to be litigated as class actions in federal court.

According to the Ninth Circuit, "[w]here a statute is silent on the availability of class relief, the Supreme Court has instructed that we presume it to be available in all 'civil actions brought in federal court.'" *Bateman v. Am. Multi–Cinema, Inc.*, 623 F.3d 708, 717 (9th Cir.2010) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 699–700 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). As TCPA is silent on the subject of class relief, this Court must presume its availability.

D. ***Defendant's Settlement Offer Does Not Moot Plaintiff's Claim***

Defendant contends that its separate offer of settlement also mooted Plaintiff's claims. In this case, Plaintiff has not accepted either the Rule 68 Offer or the Settlement Offer. In light of the Court's ruling that Defendant's unaccepted Rule 68 offer of judgment does not moot Plaintiff's putative class claim, the Court also finds that Defendant's unaccepted Settlement Offer does not moot Plaintiff's claim.

III.

PLAINTIFF'S MOTION TO STRIKE

Plaintiff contends Defendant's Rule 68 Offer should be quashed because it is an improper attempt to "pick off" Plaintiff's claim and that it should be quashed because Rule 68 does not allow a party to file a Rule 68 offer unless it has been accepted.

Defendant filed notice of its Rule 68 Offer on January 5, 2011. Rule 68 provides that "[i]f, within 14 days after being served, *the opposing party serves written notice accepting the offer*, either party may then file the offer and notice of acceptance, plus proof of service." Fed.R.Civ.P. 68 (emphasis added). Here, because Plaintiff did not accept Defendant's offer of judgment, Defendant was not entitled under Rule 68 to file the offer of judgment.

The Court therefore grants Plaintiff's motion strike Defendant's Rule 68 Offer.

IV.

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiff seeks to certify a class pursuant to Fed.R.Civ.P. 23(b)(3) comprised of "all persons in the United States and its Territories who received one or

more unauthorized text message advertisements from Defendant." (Compl. ¶ 20.) Defendant objects to evidence presented by Plaintiff in support of his Motion for Class Certification.

Pursuant to the parties' Stipulation, on June 3, 2010, the Court extended the deadline for Plaintiff to file his Motion for Class Certification "until after all Parties have answered and presented a proposed discovery schedule to the Court setting forth the deadlines and requirements associated with the parties' Rule 26(f) conference and report." [Doc. # 10.] On January 5, 2011, Defendant served on Plaintiff the Rule 68 Offer. On January 19, 2010, Plaintiff hastily moved to strike the Rule 68 Offer and for class certification. On January 25, 2011, the parties filed their Joint Rule 26(f) report without proposing any schedule for class discovery. [Doc. # 36.] As a result of Defendant's Rule 68 Offer, Plaintiff was prompted to file his Motion for Class Certification *before* the parties filed their Joint Rule 26(f) report, contrary to the spirit of the parties' Stipulation in this case.

In light of the parties' Stipulation and the Court's ruling that this case is not moot, the Court defers its ruling on Plaintiff's Motion for Class Certification until after the parties have had an opportunity to engage in class discovery. Defendant's evidentiary objections are DENIED as moot.

V.
CONCLUSION

In light of the foregoing,

1. Defendant's Motion to Dismiss/Motion for Summary Judgment is DENIED.
2. Plaintiff's Motion to Strike and Quash is GRANTED; and

3. The Court defers its ruling on Plaintiff's Motion for Class Certification until after the parties have conducted class discovery:

   a. The parties shall meet and confer regarding a schedule for class discovery and shall file an Amended Joint Rule 26(f) Report regarding their proposed schedule by **April 22, 2011;**

   b. The parties shall meet and confer regarding a new schedule for supplemental briefing, if any, on Plaintiff's Motion for Class Certification and shall include their proposed schedule in their Amended Joint Rule 26(f) Report.

   c. The parties shall appear for a telephonic Status Conference on **May 2, 2011 at 11:00 a.m.**

IT IS SO ORDERED.

Michael L. Mallow (State Bar No. 188745)
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Attorneys for Defendant
Campbell-Ewald Company

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE GOMEZ, individually and on behalf of a class of similarly situated individuals, Plaintiff, v. CAMPBELL-EWALD COMPANY, a Delaware corporation, Defendant.	Case No. CV10-2007-DMG (CWx) Assigned to Hon. Dolly M. Gee OFFER OF JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 68

1. Pursuant to Federal Rule of Civil Procedure 68, Defendant Campbell-Ewald Company ("C-E") hereby

offers to allow judgment to be entered against it in this action in the amount of $1503 for each unsolicited text message that plaintiff Jose Gomez ("Gomez") allegedly received from or on behalf of C-E. In addition, C-E agrees to pay Gomez for any costs which are recoverable in this action, as determined by the Court.

2. This offer of judgment includes $1503 per text message ($501 trebled) that Gomez has requested as damages for alleged violation of the Telephone Consumer Protection Act ("TCPA"). Gomez has alleged that he received one text message from or on behalf of C-E on May 11, 2006. C-E will pay Mr. Gomez $1503 for the alleged text message.

3. C-E will pay an additional $1503 per text message for any other unsolicited text messages that Mr. Gomez alleges were sent to him in the "several months" following May 11, 2006, as alleged in Paragraph 18 of his complaint, provided that Mr. Gomez and his counsel have a reasonable belief satisfying Federal Rule of Civil Procedure 11 that such messages were sent by or on behalf of C-E.

4. Campbell-Ewald further offers to pay for any and all reasonable costs allowable under law incurred by Gomez to his attorneys in this matter. Gomez must file a Notice of Application to the Clerk to Tax Costs pursuant to Local Rule 54-2 to recover such costs. Attorneys' fees are not recoverable under the TCPA.

5. Campbell-Ewald further offers to allow the Court to enter an injunction in the form proposed in Exhibit 1.

6. This offer is intended to fully satisfy the individual claims of Gomez asserted in this action or which could have been asserted in this action.

7. Pursuant to Federal Rule of Civil Procedure 68, this offer of judgment is made at least fourteen days before the date set for trial. This offer shall be deemed withdrawn unless written notice of acceptance is received within fourteen days of service.

8. This offer of judgment is made for purposes of Rule 68 only and shall not constitute or otherwise be construed as an admission of liability in any respect.

Dated: January 5, 2011

LOEB & LOEB LLP
MICHAEL L. MALLOW
LAURA A. WYTSMA
CHRISTINE M. REILLY

By */s/ Laura A. Wytsma*
Laura A. Wytsma
Attorneys for Defendant
CAMPBELL-EWALD
COMPANY

EXHIBIT 1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE GOMEZ, individually and on behalf of a class of similarly situated individuals, Plaintiff, v. CAMPBELL-EWALD COMPANY, a Delaware corporation, Defendant.	Case No. CV10-2007-DMG (CWx) Assigned to Hon. Dolly M. Gee [PROPOSED] STIPULATED PERMANENT INJUNCTION

1. The Court has jurisdiction over the subject matter of this action and over all parties to this action.

2. Plaintiff Jose Gomez ("Gomez") has filed a complaint under the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), seeking damages and requesting injunctive relief. Gomez asserted a putative class action on behalf of himself and all others who received one or more unauthorized text message advertisements from defendant Campbell-Ewald Company ("C-E").

3. C-E has reached an individual settlement with Gomez, pursuant to which this case will be dismissed.

4. C-E consents to the entry of this Stipulated Permanent Injunction without admitting any liability or admitting any allegations in the complaint.

5. C-E consents to the entry of this Stipulated Permanent Injunction without admitting that grounds exist for the imposition of an injunction.

6. C-E consents to the entry of this Stipulated Permanent Injunction without further notice, and agrees that this Court shall retain jurisdiction over it for the purpose of implementing and enforcing this injunction.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. C-E agrees to an injunction barring it from using automated telephone equipment to send text messages to mobile phones in violation of the TCPA.

2. C-E is not prohibited from sending text messages by any means, including automated telephone equipment, to any person who has given his or her consent to receive such messages or as otherwise permitted by the TCPA.

3. The Court shall retain jurisdiction over this action for purposes of implementing and enforcing this Stipulated Permanent injunction.

Dated: _____, 2011

_____

Honorable Dolly M. Gee
United States District Judge

LOEB & LOEB LLP

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January 5, 2011

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Re: *Jose Gomez v. Campbell-Ewald Company*
Case No. CV-10-02007 DMG (CWx)

Dear Gentlemen:

As you know, we represent Campbell-Ewald Company ("C-E") in the above-referenced lawsuit filed under the Telephone Consumer Protection Act ("TCPA").

C-E makes the following settlement offer to plaintiff Jose Gomez to resolve all claims which he has or had against C-E arising from or related to any unsolicited text messages that were allegedly sent by or on behalf of C-E to Mr. Gomez between March 19, 2006, and the

present. In extending this settlement offer, C-E does not admit any liability.

C-E hereby offers to pay Mr. Gomez the sum of $1503 for each and every unsolicited text message that was allegedly sent by or on behalf of C-E to any cell phone owned by Mr. Gomez or for which Mr. Gomez was the subscriber or the person responsible for payment. The complaint identifies only a single text message on May 11, 2006, and we are not aware of any other text messages sent to Mr. Gomez by or on behalf of C-E. Please identify any additional unsolicited text messages that Mr. Gomez alleges that he received on his cell phone in the "several months" following May 11, 2006, so that I may arrange for payment. In identifying these additional text messages, we trust that your firm will exercise good faith consistent with the obligations of Federal Rule of Civil Procedure 11 in determining whether it can reasonably be alleged that the additional text messages were sent by or on behalf of C-E (as opposed to merely from the unidentified SMS number referenced in the Complaint).

C-E also agrees to pay Mr. Gomez any costs which he would recover were he to prevail in his suit, including filing fee and any service fees which would be taxable as costs. This offer does not include attorneys' fees, which are not recoverable under the TCPA. Please provide me in writing with an itemized statement of recoverable costs so that I may arrange for payment of these as well.

C-E further agrees as part of its settlement offer to the entry of a stipulated injunction as sought in Mr. Gomez's complaint. Specifically, C-E will stipulate to an injunction prohibiting it from the alleged "wireless

spam activities," *viz.*, sending unsolicited commercial text messages to cellular telephones unless the subscriber has consented to receive such text messages or the TCPA permits such text messages to be sent. A proposed injunction is enclosed for your consideration.

The offers extended in this letter are intended to fully satisfy the individual claims of Mr. Gomez or which could have been made in his suit.

Please advise whether Mr. Gomez will accept C-E's offer so that I may arrange for prompt payment.

Sincerely,

/s/ Laura A. Wytsma
Laura A. Wytsma

Enclosure
cc: Michael L. Mallow
Christine M. Reilly

[Offer Letter enclosure]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE GOMEZ, individually and on behalf of a class of similarly situated individuals, Plaintiff, v. CAMPBELL-EWALD COMPANY, a Delaware corporation, Defendant.	Case No. CV10-2007-DMG (CWx) Assigned to Hon. Dolly M. Gee [PROPOSED] STIPULATED PERMANENT INJUNCTION

1. The Court has jurisdiction over the subject matter of this action and over all parties to this action.

2. Plaintiff Jose Gomez ("Gomez") has filed a complaint under the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), seeking damages and requesting injunctive relief. Gomez asserted a putative class action on behalf of himself and all others who received one or more unauthorized text message advertisements from defendant Campbell-Ewald Company ("C-E").

3. C-E has reached an individual settlement with Gomez, pursuant to which this case will be dismissed.

4. C-E consents to the entry of this Stipulated Permanent Injunction without admitting any liability or admitting any allegations in the complaint.

5. C-E consents to the entry of this Stipulated Permanent Injunction without admitting that grounds exist for the imposition of an injunction.

6. C-E consents to the entry of this Stipulated Permanent Injunction without further notice, and agrees that this Court shall retain jurisdiction over it for the purpose of implementing and enforcing this injunction.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. C-E agrees to an injunction barring it from using automated telephone equipment to send text messages to mobile phones in violation of the TCPA.

2. C-E is not prohibited from sending text messages by any means, including automated telephone equipment, to any person who has given his or her consent to receive such messages or as otherwise permitted by the TCPA.

3. The Court shall retain jurisdiction over this action for purposes of implementing and enforcing this Stipulated Permanent injunction.

Dated: _____, 2011

_____

Honorable Dolly M. Gee
United States District Judge

FILED
OCT 24 2014
MOLLY C. DWYER,
CLERK
U.S. COURT OF
APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE GOMEZ, individually and on behalf of a class of similarly situated individuals, Plaintiff - Appellant, v. CAMPBELL-EWALD COMPANY, Defendant - Appellee.	No. 13-55486 D.C. No. 2:10-cv-02007-DMG-CW Central District of California, Los Angeles ORDER

Before: BENAVIDES,* WARDLAW, and CLIFTON, Circuit Judges.

Appellee's motion for a stay of the issuance of the mandate pending a petition for writ of certiorari is GRANTED. Fed. R. App. P. 41(b).

The mandate shall be stayed for 90 days from the filing date of this order pending the filing of a petition for writ of certiorari in the Supreme Court. If a

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* The Honorable Fortunato P. Benavides, Senior Circuit Judge for the U.S. Court of Appeals for the Fifth Circuit, sitting by designation.

petition for writ of certiorari is filed, the stay shall continue until final disposition by the Supreme Court.

IT IS SO ORDERED.

United States Constitution art. III, § 2

Section. 2. The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[1]

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

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[1] This section has been affected by the Eleventh Amendment.

47 U.S.C. § 227

§ 227. Restrictions on use of telephone equipment

* * *

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes

or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through—

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before July 9, 2005; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has

been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

* * *

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

* * *

Federal Rule of Civil Procedure 68(a)

Rule 68. Order of Judgment.

(a) **Making an Offer; Judgment on an Accepted Offer.** At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

* * *

Supreme Court, U.S.
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No. 14-857

IN THE

Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether an unaccepted offer of judgment, which has no legal effect if not accepted and which provides the plaintiff with no relief, renders it impossible for a court to provide effectual relief and thus moots the plaintiff's claims.

2. Whether an unaccepted offer of judgment to the named plaintiff in a class action, which would have provided relief to the named plaintiff but left the class's damages claims unredressed if it had been accepted, moots the named plaintiff's effort to assert claims on behalf of the class.

3. Whether a private company that violates the Telephone Consumer Protection Act by causing texts to be sent to mobile phones without the consent of the recipients is immunized against liability because it has a contract to perform services for the federal government or one of its agencies, where the violation was outside the scope of any authority or approval conferred by the government.

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INTRODUCTION

Petitioner Campbell-Ewald Company asks this Court to consider whether its unaccepted offer of judgment to the named plaintiff in a proposed class action moots both the plaintiff's individual claims and his effort to represent a class, though his claims remain unredressed. This Court's consideration of those questions now would be unnecessary and premature because the courts of appeals have not disagreed about their resolution in the wake of this Court's recent decision in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). The federal appellate courts' continued consideration of the impact of the opinions in *Genesis* is likely to foster reasoned development of the law and to better inform this Court's decisionmaking if conflict rather than consensus eventually emerges and review becomes warranted.

In *Genesis*, this Court considered whether a plaintiff whose individual claims were moot could pursue an opt-in collective action under the Fair Labor Standards Act (FLSA). The Court held that the FLSA action was moot because no plaintiff with a live claim had opted in. The Court emphasized that decisions holding that putative class actions survive the mootness of claims of named plaintiffs were "inapposite" "because Rule 23 actions are fundamentally different from collective actions under the FLSA." 133 S. Ct. at 1529.

The *Genesis* majority did not address whether an unaccepted offer of judgment can moot a plaintiff's individual claims, because it held the issue was not presented by the petition, had not been raised in a cross-petition, and had been waived by the respondent below. Thus, the Court assumed, without deciding,

that the plaintiff's individual claim was moot. 133 S. Ct. at 1529. Justice Kagan, joined by three other Justices in dissent, addressed the issue and explained why an unaccepted offer of judgment, which, like any other rejected settlement offer, is a legal nullity, cannot moot a plaintiff's claims: Such an offer leaves the plaintiff's interest in the lawsuit "just what it was before" and does not make it "impossible for a court to grant any effectual relief." *Id.* at 1533–34 (Kagan, J., dissenting). Justice Kagan's reasoning "conflicts with nothing in the Court's opinion," which declined to address the issue. *Id.* at 1534.

Since *Genesis*, two circuits, the Eleventh and Ninth, have adopted Justice Kagan's analysis and held that an offer of judgment does not moot a claim. *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698 (11th Cir. 2014); *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948 (9th Cir. 2013); *accord* Pet. App. 5a. Others have recognized that the issue is open. No court of appeals has considered and rejected Justice Kagan's reasoning.

Likewise, since *Genesis*, courts of appeals have agreed that, regardless of whether an offer of judgment moots a plaintiff's individual claims, it does not bar him from representing a class merely because it precedes class certification. *See, e.g., Stein*, 772 F.3d at 709; *accord* Pet. App. 5a–7a.

Review of the mootness issues here is unwarranted given the absence of appellate disagreement in the aftermath of *Genesis*, the force of Justice Kagan's reasoning with respect to whether an unaccepted offer can moot an individual's claim, and the *Genesis* majority's express recognition that class actions and FLSA actions are fundamentally different from the

standpoint of mootness. Cases presenting these issues continue to percolate through the courts of appeals, and if a post-*Genesis* conflict emerges, this Court will have ample opportunity to address it.

Campbell-Ewald also asks this Court to consider whether it is immune from liability for its Telephone Consumer Protection Act (TCPA) violations because its client was the U.S. Navy. Campbell-Ewald relies primarily on a 1940 decision of this Court holding that a federal public works contractor was not liable for the taking of property destroyed by the project where a takings remedy against the government was available. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18. Campbell-Ewald also invokes cases such as *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), holding that *state* common law claims against federal contractors are *preempted* when a federal contract requires actions that are the basis for the claimed liability under state law.

No authority Campbell-Ewald cites addresses whether a private entity may be immunized from liability for conduct that violates a federal statute merely because it has contracted to perform services for the federal government, especially when, as here, its conduct was contrary to the government's directives and policies. Absent a conflict over that issue, Campbell-Ewald's novel request for immunity on the particular facts of this case does not merit review.

STATEMENT

This case arose when Campbell-Ewald caused text messages to be sent using automated dialing equipment to the cell phones of approximately 100,000 people who had not consented to receive those messages, in violation of the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii).

Campbell-Ewald devised the messages under a contract to provide marketing services for the Navy, but the contract did not require it to send text messages and gave Campbell-Ewald substantial discretion as to how to perform its services. ER 88, 101–04, 400–02.[1] The contract required Campbell-Ewald to comply with all applicable laws, ER 299, 708, and the Navy specifically insisted that no messages could be sent to cell phones without the recipients' consent. ER 129–29; ER 136–37. The Navy relied on Campbell-Ewald's representations that it would not send texts to recipients absent consent. ER 109–11, 127–32, 381, 393.

Respondent Jose Gomez received multiple messages sent at Campbell-Ewald's behest. ER 60. He brought this action on behalf of a proposed class of recipients of unauthorized texts seeking statutory damages for each violation under the TCPA. 47 U.S.C. § 227(b)(3). Before the time established by court-approved stipulation of the parties for filing a motion for class certification, *see* SER 24–26, 32–33, Campbell-Ewald served him with an offer of judgment under Federal Rule of Civil Procedure 68.[2] The offer did not specify the amount Campbell-Ewald would pay, but offered $1503 (representing the maximum statutory damages under the TCPA) for each message as to which Mr. Gomez had "a reasonable belief satisfying

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[1] "ER" and "SER" respectively refer to the Excerpts of Record and Supplemental Excerpts of Record in the Ninth Circuit.

[2] Campbell-Ewald also made a settlement offer with the same terms. Although the settlement offer, unlike the Rule 68 offer, did not expire by operation of law after 14 days, Campbell-Ewald's assertion that it remains open by its terms is incorrect: The offer, like any other contract offer, became a nullity when rejected. *See Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting).

[Rule 11] that such messages were sent by or on behalf of C-E." SER 14. The offer thus required additional factual development to determine the amount Campbell-Ewald consented to pay, and left open possible disputes over whether Mr. Gomez had a sufficient basis for alleging liability. The offer did not include attorney fees, although the complaint requested fees.

Mr. Gomez moved to quash and strike the offer of judgment and moved for class certification as soon as permitted under the district court's local rules requiring parties to confer over any such motion. Campbell-Ewald moved to dismiss the complaint for lack of jurisdiction on the theory that its offer mooted the case.

The district court denied the motion to dismiss and granted the motion to strike the offer, eliminating it from the record. Later, however, the court granted summary judgment to Campbell-Ewald on the ground that it was immune from liability under *Yearsley* because it was a Navy contractor.

Mr. Gomez appealed the summary judgment ruling. Campbell-Ewald took no cross-appeal from the court's order striking the offer of judgment, but nonetheless argued that the district court lacked subject-matter jurisdiction based on the offer. Campbell-Ewald also defended the district court's immunity ruling and urged affirmance on the alternative grounds that it was not liable because it had used another company to send the messages and that the TCPA violates the First Amendment.

The court of appeals vacated and remanded. Relying on its recent decision in *Diaz*, 732 F.3d at 955, which held that an unaccepted offer of judgment cannot moot a plaintiff's claims because it does not make

it impossible for a court to grant effectual relief, the court held that Mr. Gomez's individual claim was not moot. Alternatively, the court held that even if his individual claim were moot, the class claims would remain justiciable under the court's ruling in *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011). The court rejected Campbell-Ewald's contention that *Genesis* implicitly overruled *Pitts* and similar decisions of other circuits.

The court also rejected Campbell-Ewald's various claims of entitlement to summary judgment. With respect to immunity, the court held that *Yearsley*, on which Campbell-Ewald principally relied, did not broadly immunize federal contractors against federal statutory claims. The court found immunity particularly unwarranted because "[t]he record contains sufficient evidence that the text messages were contrary to the Navy's policy permitting texts only to persons who had opted in to receive them." Pet. App. 20a. As the court observed, "In the seventy-year history of the *Yearsley* doctrine, it has apparently never been invoked to preclude litigation of a dispute like the one before us." Pet. App. 16a. The court further noted that the federal contractor defense recognized in *Boyle* is inapplicable because *Boyle* is based on preemption and this case involves federal claims. *Id.* at 18a.

REASONS FOR DENYING THE WRIT

I. There is no present need for review of the mootness issues.

Campbell-Ewald's claim that this case is moot would require acceptance of two distinct propositions: first, that an offer of judgment to an individual plaintiff moots his individual claims even while providing

him no relief; and second, that if the offer moots the plaintiff's individual claims, it also moots his effort to represent a class if the class has not yet been certified. Because the class claims in this case would only be nonjusticiable if the Court were to rule in favor of Campbell-Ewald on *both* points, the Court should deny certiorari on both issues unless both now merit resolution by this Court.

Neither issue now requires resolution by this Court. As Campbell-Ewald acknowledges, since Justice Kagan's unrebutted demonstration in *Genesis* that an unaccepted offer of judgment does not moot an individual plaintiff's claims, courts of appeals that have considered her analysis have either adopted it or found it unnecessary to address the issue; no court of appeals has rejected Justice Kagan's reasoning. *See* Pet. 17. Appellate courts that have addressed the class-action issue since *Genesis* have agreed that *Genesis*'s recognition of the differences between class actions and FLSA actions supports a holding that a putative class action is not mooted by an unaccepted offer to the named plaintiff just because the class has not yet been certified. Unless and until *Genesis* elicits significant disagreement among the courts of appeals, review by this Court is unwarranted.

A. This Court should not now consider whether an unaccepted offer of judgment moots a plaintiff's individual claims.

1. This Court has not already decided that the issue merits review.

Campbell-Ewald asserts that this Court has "already concluded that the threshold jurisdictional question presented by this case warrants certiorari"

because it "granted certiorari [in *Genesis*] to decide ... whether a case becomes moot ... when the plaintiff receives an offer of complete relief on his claims." Pet. 12, 1–2. As *Genesis* explains, that assertion is wrong: Although the issue might have fallen within the literal wording of the question presented in *Genesis*, the Court did not consider it properly presented because the respondent had not cross-petitioned and had not disputed, in the lower courts or the brief in opposition, that an offer of judgment of complete relief moots an individual's claim. 133 S. Ct. at 1528–29.

The Court's holding that the individual mootness question was not presented by the petition in *Genesis* leaves no doubt that, as the Court expressly said, "We granted certiorari to resolve whether [an FLSA collective action] is justiciable when the lone plaintiff's individual claim becomes moot." *Id.* at 1526. The mootness of the individual's claim, which was uncontested when certiorari was granted, was an assumption on which the Court granted review and decided the case, not the issue it granted certiorari to decide.

Genesis thus by no means indicates that this Court has already decided that the question whether an offer of judgment moots an individual claim warrants review. But even if that issue might have appeared to merit resolution by this Court before *Genesis*, the impact of the *Genesis* opinions and the lower courts' reactions to them obviate any present need for review.

2. There is no post-*Genesis* circuit-split.

As both *Genesis* and the petition point out, before *Genesis* some federal courts of appeals had held or assumed that an offer of judgment for complete relief mooted an individual plaintiff's claim. *See* 133 S. Ct. at 1528–29 & nn. 3–4; Pet. 14–15. Their discussions of

the issue, as the petition illustrates, tended to be conclusory, and when they attempted to explain how an unaccepted offer pursuant to which the plaintiff received no relief could moot a claim, their reasoning was illogical and self-contradictory.

The Seventh Circuit, for example, asserted that a plaintiff who rejects an offer of complete relief "loses outright ... because he has no remaining stake," *Damasco v. Clearwire Corp.*, 662 F.3d 891 895 (7th Cir. 2011), and because "[y]ou cannot persist in suing after you've won." *Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999). To say a plaintiff who has received nothing "has no remaining stake" and "loses" because he already "won" is nonsensical. Other courts embraced equally self-contradictory propositions by saying an offer mooted a plaintiff's claims but then directing entry of judgment in his favor—despite the supposed absence of Article III jurisdiction. *O'Brien v. Ed Donnelly Ents., Inc.*, 575 F.3d 567, 574–75 (6th Cir. 2009).

In *Genesis*, Justice Kagan disagreed that the underlying mootness question should be treated as waived, and her dissent therefore addressed the issue that the majority did not decide. *See* 133 S. Ct. at 1533–35 (Kagan, J., dissenting). Her opinion was the first major opinion at any level to subject the proposition that an unaccepted offer of judgment for complete relief moots a plaintiff's claim to critical analysis under this Court's decisions defining mootness.

As the opinion explains, this Court has held that a case is moot only when it has become "impossible for a court to grant any effectual relief whatever to the prevailing party" and the parties have no "concrete interest ... in the outcome of the litigation." *Chafin v.*

Chafin, 133 S. Ct. 1017, 1023 (2013); *accord Knox v. Serv. Employees Int'l Union*, 132 S. Ct. 2277, 2287 (2012). An unaccepted offer of judgment, no matter how extensive the relief it offers, does not meet these criteria. Under Rule 68, an unaccepted offer is deemed withdrawn and is a "legal nullity," as is any other rejected settlement offer. *Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting). An unaccepted offer neither provides relief to the plaintiff nor authorizes the court to do so. Its only ongoing effect is that it may support an award of costs to the defendant if a judgment later won by the plaintiff is not more favorable than the offer. *See id.* at 1536; *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 350–52 (1981).

An unaccepted offer thus "cannot moot a case," because the interest of the plaintiff who rejected it "remains just what it was before," "[a]nd so too does the court's ability to grant her relief." *Genesis*, 133 S. Ct. at 1533.

> After the offer lapsed, just as before, [the plaintiff] possessed an unsatisfied claim, which the court could redress by awarding her damages. As long as that remained true, [the plaintiff's] claim was not moot, and the District Court could not send her away empty-handed.

Id. at 1533–34.

As Justice Kagan stated, and the majority did not contest, her analysis of the mootness issue "conflicts with nothing in the Court's opinion." *Id.* at 1534. The majority opinion said repeatedly that it was not deciding the issue, *see id.* at 1528–29 & n.4, and cited *Baldwin v. Reese*, 541 U.S. 27, 34 (2004), which says that in such circumstances the Court's opinion does not "express[] any view on the merits of the issue."

Moreover, nothing in the majority's analysis implies that an unsatisfied claim for monetary damages can be called moot.

Justice Kagan's opinion therefore invited lower courts to "[r]ethink" the "mootness-by-unaccepted-offer theory" and refrain from adopting it if they had not yet endorsed it. 133 S. Ct. at 1534 (Kagan, J., dissenting). So far, no court of appeals has rejected Justice Kagan's analysis and signaled that it will adhere to or adopt the view that an unaccepted offer can moot a claim notwithstanding her demonstration that that view is untenable.

Two courts have thoroughly discussed and expressly adopted Justice Kagan's view: the Eleventh Circuit in *Stein*, 772 F.3d at 702–04, and the Ninth in *Diaz*, 732 F.3d at 954–55, which that court followed in this case. Three circuits, the Second, Fifth, and Seventh, have recognized that Justice Kagan's opinion throws open the issue whether an offer of judgment can moot a claim, but those courts did not have to resolve the issue in the cases before them because they found that the offers of judgment did not offer complete relief and thus could not moot the plaintiffs' claims even if Justice Kagan's view were rejected. *See Cabala v. Crowley*, 736 F.3d 226, 228 n.2 (2d Cir. 2013); *Payne v. Progressive Fin. Servs., Inc.*, 748 F.3d 605, 608 n.1 (5th Cir. 2014); *Smith v. Greystone Alliance, LLC*, 772 F.3d 448, 450 (7th Cir. 2014); *Scott v. Westlake Servs. LLC*, 740 F.3d 1124, 1126 n.1 (7th Cir. 2014); *Swanigan v. City of Chicago*, 775 F.3d 953, 960 n.3 (7th Cir. 2015).

Moreover, courts that have noted but not resolved the issue in the wake of *Genesis* have indicated that they are receptive to Justice Kagan's logic. The Sec-

ond Circuit in *Cabala*, for example, observed that only after entry of judgment in a plaintiff's favor is "the controversy resolved such that the court lacks further jurisdiction." 736 F.3d at 228. The Seventh Circuit has recognized three times that Justice Kagan's opinion provides "reasons to question our approach to the problem," *Scott*, 704 F.3d at 1126 n.1, but deferred consideration of the issue until presented with a case that requires its resolution. *See also Swanigan*, 775 F.3d at 960 n.3; *Smith*, 772 F.3d at 450. That court has also acknowledged the correctness of Justice Kagan's point that "[a] suit is moot when relief is impossible, ... and there's no doubt that a court could provide [a plaintiff who rejected an offer] with relief in the form of money damages." *Id.* at 449.[3]

Importantly, no court of appeals has rejected Justice Kagan's analysis.[4] Other courts of appeals have not yet addressed the issue after *Genesis*, but the is-

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[3] The court went on to say that the issue, "if any," posed by an offer is whether it vitiates the existence of a "controversy," *id.*, but did not explain how that issue differs from mootness or why there might be no "controversy" between a plaintiff who has received no relief and a defendant who refuses to provide relief until a court finally orders it. This Court held in *United States v. Windsor*, 133 S. Ct. 2675, 2686 (2013), that there is "a controversy sufficient for Article III jurisdiction" in such circumstances.

[4] The Sixth Circuit avoided the need to decide the issue in the wake of *Genesis* by finding that an offer did not provide complete relief. *Hrivnak v. NCO Portfolio Mgmt., Inc.*, 719 F.3d 564, 567–70 (6th Cir. 2013). The Second Circuit, in *Doyle v. Midland Credit Mgmt., Inc.*, 722 F.3d 78 (2d Cir. 2013), found a case moot based on an offer of judgment, but did not consider Justice Kagan's analysis because the plaintiff did not contest that a Rule 68 offer of complete relief can moot a claim, but argued only that the offer in that case did not meet Rule 68's requirements.

sue is pending in (at least) the First, Second, Third, Fifth, Sixth, and Tenth Circuits.[5] The pending cases offer those courts the opportunity to consider the issue with the benefit of Justice Kagan's reasoning for the first time. Until a court presented with that reasoning articulates some basis for rejecting it, there is no need for this Court's intervention.

Campbell-Ewald insists, however, that an "acknowledged circuit conflict ... persists" and that the Ninth Circuit "recognized" the conflict in *Diaz*. Pet. 2, 16. But every case cited by Campbell-Ewald on its side of the issue (and by the Ninth Circuit in *Diaz*) *predated Genesis*. Those decisions offer little reason to conclude that a conflict will "persist" in light of the power of Justice Kagan's reasoning and the recognition by every court of appeals to weigh in so far that her reasoning either is correct or at least leaves the issue open to further consideration. Campbell-Ewald itself acknowledges that the post-*Genesis* appellate decisions have "followed Justice Kagan's dissent." Pet. 17. If that "trend" (*id.*) continues, and the ongoing appellate consideration of the issue yields consensus in favor of Justice Kagan's approach, there will be no reason for this Court to step in. If the process eventually produces disagreement, review by this Court may become warranted, but the Court would then have the benefit of the reasoned views of more

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[5] *Bais Yaakov v. ACT, Inc.*, No. 14-1789 (1st Cir.); *Tanasi v. New Alliance Bank*, No. 14-1389 (2d Cir.); *Franco v. Allied Interstate LLC*, No. 14-1464 (2d Cir.); *Weitzner v. Sanofi Pasteur, Inc.*, No. 14-3423 (3d Cir.); *Hooks v. Landmark Indus., Inc.*, No. 14-20496 (5th Cir.); *Mey v. N. Am. Bancard, LLC*, No. 14-2574 (6th Cir.); *Jacobson v. Credit Control Servs.*, No. 14-1425 (10th Cir.).

courts of appeals in determining whether and how to resolve the issue.

3. The lower courts' post-*Genesis* decisions are correct.

Campbell-Ewald characterizes the lower courts' ongoing, reasoned consideration of the issue in light of Justice Kagan's opinion as "unrest," Pet. 17, and hints darkly that there is something improper about resolving the issue in a way that implies that *Genesis* was decided on a "faulty premise." *Id.* But the *Genesis* majority itself said that it decided the case on the "assumption" that the individual claims were moot and that it expressed *no view* on the correctness of that premise. *Genesis*, 133 S. Ct. at 1528–29 & n.4. Contesting a premise that the Court said it was not endorsing is neither improper nor disrespectful. Campbell-Ewald's invocation of the truism that "[c]ourts of appeals are bound to follow the majority decisions of this Court—not statements of dissenting opinions," Pet. 17–18, is beside the point, because no court has claimed to be "bound" by Justice Kagan's reasoning, only to find it *persuasive* on issues *not controlled* by a majority decision of this Court.

Campbell-Ewald's implication that courts are precluded from following Justice Kagan's opinion by "the Article III principles discussed by the majority" in *Genesis*, Pet. 18, founders on Campbell-Ewald's failure to point to any "Article III principle" discussed by the majority that suggests that a contested and wholly unredressed claim, for which a court could provide an effectual remedy, is moot. Campbell-Ewald's citation of a footnote in which the majority states that "*satisfaction*" of a claim would eliminate a case or controversy, 133 S. Ct. 1529 n.4 (emphasis added), does not

contradict Justice Kagan's point that an *unsatisfied* claim is not mooted by an unaccepted offer, and the footnote expressly states that the Court is not addressing that point.[6] More pertinent is the *Genesis* majority's recognition that a claim for statutory damages "remains live until it is settled, judicially resolved, or barred by a statute of limitations." *Id.* at 1531. *That* Article III principle necessarily implies that a mere offer that by itself provides no satisfaction does not moot a damages claim.

Indeed, Campbell-Ewald makes virtually no effort to refute Justice Kagan's demonstration that unsatisfied claims cannot be moot. Campbell-Ewald is content to rely on the conclusory and internally contradictory statements of courts and commentators before *Genesis* and on vague invocation of Article III principles. Campbell-Ewald's failure to offer a substantive response to Justice Kagan's analysis provides further reason to doubt that there will be any persistent circuit conflict once courts have the opportunity to address the issue, and it obviates any concern that allowing the issue to continue percolating through the circuits will perpetuate error—particularly when the issue is currently pending in no less than six circuits.

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[6] The footnote took issue with Justice Kagan's suggestion that the collective-action mootness point would never arise again. It pointed out that regardless of whether an unaccepted offer could moot an individual's claim, nothing in the FLSA "precludes *satisfaction*—and thus the mooting—of the individual's claim before the collective-action component of the suit has run its course." 133 S. Ct. at 1529 n.4 (emphasis added). The footnote merely recognized that a plaintiff who actually settled her own FLSA claim would have no further case or controversy with the defendant.

B. Campbell-Ewald's contention that a pre-certification offer of individual relief to a named plaintiff moots a class action does not merit review.

Campbell-Ewald also seeks review of the court of appeals' alternative holding that the offer of judgment did not render class claims nonjusticiable even if it could be said to have mooted the named plaintiff's individual claim. There is no need to reach that issue unless the court of appeals erred in concluding that the offer did not moot the named plaintiff's claim. Because, as shown above, the court's resolution of that antecedent question does not merit review, the Court also should deny review of the question whether the class claims survive the supposed mootness of the named plaintiff's claim.

In any event, the issue concerning the class claims is no more worthy of review than the question whether the plaintiff's individual claims are moot. No court of appeals, before or after *Genesis*, has accepted Campbell-Ewald's position that an offer of judgment to a named plaintiff moots his effort to represent a class as long as it is made before the class is certified.

1. The courts of appeals have rejected the argument that an offer of judgment before a class is certified moots class claims.

Following *Genesis*, both the Eleventh Circuit, in *Stein*, and the Ninth Circuit, in this case, have held that even if an offer of judgment of complete individual relief mooted a named plaintiff's individual claims, it would not bar him from representing a class. *See Stein*, 722 F.3d at 704–09; Pet. App. 5a–7a. Both courts reasoned that *Genesis*'s holding that a plaintiff

whose personal claims are moot cannot pursue an FLSA collective action does not require a similar holding with respect to a class action, because *Genesis* expressly stated that the fundamental differences between FLSA collective actions and class actions rendered decisions concerning one inapposite to the other. Both courts determined that a plaintiff who seeks to represent a class has the necessary personal stake to proceed, and that the ultimate certification of the class may relate back to the filing of the complaint, so that the interests of the nascent class also support the existence of a case or controversy.

Two other circuits also issued opinions after *Genesis* concluding that its collective-action mootness analysis did not apply to class actions, and that an offer of judgment to a named plaintiff therefore would not moot class claims. *See Schlaud v. Snyder*, 717 F.3d 451, 456 n.3 (6th Cir. 2013); *Mabary v. Home Town Bank, N.A.*, 771 F.3d 820, 824 (5th Cir. 2014). In both cases, subsequent events unrelated to the mootness issue deprived the opinions of precedential effect. This Court vacated and remanded *Schlaud* in light of *Harris v. Quinn*, 134 S. Ct. 2618 (2014), because the putative class's substantive claim was similar to the one decided in *Harris*. *Schlaud v. Snyder*, 134 S. Ct. 2899 (2014). In *Mabary*, the Fifth Circuit withdrew its opinion when the parties jointly moved to dismiss the appeal while a rehearing petition was pending. Thus, neither opinion is precedential, but they signal the courts' views with respect to the issue.

By contrast, no court of appeals since *Genesis* has accepted Campbell-Ewald's argument that the decision requires dismissal of a proposed class action if the named plaintiff receives an offer of complete indi-

vidual relief before a class is certified.[7] Again, as with the antecedent question whether an offer can moot the named plaintiff's individual claims, the issue is pending in a number of circuits,[8] so there will be ample opportunity for review should a conflict arise over the implications of *Genesis* in this context. No such disagreement has yet arisen.

Pre-*Genesis* appellate opinions likewise rejected the view that a named plaintiff who had received an offer of judgment of complete individual relief was disabled from seeking to represent a class, even assuming that the offer mooted his individual claims. *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081; *Lucero v. Bur. of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011); *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004); *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030 (5th Cir. 1981); *see also Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1539 (8th Cir. 1996) (offer of judgment of complete individual relief does not justify terminating putative class action unless class certification has been properly denied).

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[7] In *Fontenot v. McCraw*, 777 F.3d 741 (5th Cir. 2015), the Fifth Circuit discussed *Genesis* in the course of holding that a plaintiff whose injunctive claims against a particular defendant were moot could not avoid dismissal by invoking class claims when she had failed to seek certification of a class against that defendant (even while seeking certification as to others). *See id.* at 750–51. While recognizing that *Genesis* did not foreclose the approach of its prior case law holding that individual offers of judgment do not moot class claims, the court declined to "extend" those holdings to such different circumstances. *Id.*

[8] All the cases cited above, at n.5, involve the class-action issue as well as the individual issue, except for the Tenth Circuit appeal in *Jacobson*.

2. The pre-*Genesis* decisions Campbell-Ewald cites do not support its position.

Campbell-Ewald's claim of conflict over the issue rests in part on the Seventh Circuit's decision in *Damasco v. Clearwire Corp.*, 662 F.3d 891. But *Damasco rejected* the argument, pressed by Campbell-Ewald here, that class claims are nonjusticiable whenever the named plaintiff receives an offer of complete individual relief before a class is certified. It held instead that such claims may proceed as long as the plaintiff has filed a motion for class certification—even a pro forma motion filed with the complaint—before receiving the offer, regardless of whether the court has acted upon the motion. *See id.* at 896.

After *Genesis*, the Seventh Circuit again held that a pre-certification offer does not moot a plaintiff's class claims if the plaintiff has been "diligent" in seeking certification before receiving the offer. *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1019 (7th Cir. 2014). In so holding, the court, like other post-*Genesis* appellate courts, emphasized the distinction *Genesis* drew between FLSA collective actions and class actions. *See id.* at 1017.

The Seventh Circuit's position expressed in *Damasco* is less "flexible" than the rulings of other circuits, *id.* at 1018, which have not required that a certification motion be on file, but only that a named plaintiff seek certification without undue delay. *See, e.g., Stein*, 772 F.3d at 707–08. But that difference does not justify review here. Campbell-Ewald does not argue for the *Damasco* position, but rather for a much broader rule accepted by no circuit: that an offer of judgment makes class claims nonjusticiable if it is

made before *certification*. Because no party here advocates the *Damasco* view, this case provides no occasion to resolve the narrow issue whether the diligence required for a class representative to avoid mootness is the filing of a certification motion before an offer is received or within a reasonable time thereafter.

That issue does not currently require resolution anyway. First, the Seventh Circuit is the only circuit to suggest that whether a certification motion is on file is determinative, and parties have adapted to *Damasco*'s outlier position by filing complaints and certification motions simultaneously, limiting the practical consequences of the circuit's unique view. Second, in *McMahon*, the Seventh Circuit observed that it "need not resolve this difference" between *Damasco* and the "more flexible rule" of other circuits "in the present case," suggesting that the court, in an appropriate case, would be open to bringing its position in line with the consensus of the other circuits. 744 F.3d at 1018. Third, should the Seventh Circuit reconsider the antecedent question whether an offer of judgment moots the named plaintiff's individual claims—as it has three times said it may—the *Damasco* issue would disappear altogether: The timing of an offer in relation to a certification motion has no importance if the offer does not moot the plaintiff's individual claims in the first place.

Beyond *Damasco*, Campbell-Ewald also asserts that the decision below conflicts with decisions of the Fourth and Eighth Circuits. But the decisions Campbell-Ewald cites do not, as the petition asserts, hold that a class action becomes moot "when ... the defendant makes an offer of full relief before class certification." Pet. 22. Those decisions had nothing to do

with offers of full relief. Rather, they held that plaintiffs who had *dismissed or settled* their individual claims could not appeal the denial of class certification under the circumstances of the cases. *See Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 100 (4th Cir. 2011); *Anderson v. CNH U.S. Pension Plan*, 515 F.3d 823, 826–27 (8th Cir. 2008). As the Eighth Circuit has recognized, whether a plaintiff's acceptance of a settlement in satisfaction of his claims eliminates any remaining interest he may have in pursuing class claims is a different question from whether a defendant may pick off a class representative merely by making an offer. *See Potter v. Norwest Mortgage, Inc.*, 329 F.3d 608, 612–13 (8th Cir. 2003); *see also Alpern*, 84 F.3d at 1539 (holding that offer of individual relief did not moot class claims). *Rhodes* and *Anderson*, which address a wholly different issue, do not suggest any conflict over the issue in this case.

3. The appellate consensus that a pre-certification offer does not moot class claims is not in conflict with *Genesis*.

Absent a genuine circuit conflict, Campbell-Ewald's petition rests on its assertion that the appellate decisions holding that class claims may proceed in these circumstances are contrary to *Genesis*. That argument, too, falls short of a claim of actual conflict. *Genesis* expressly distinguished class actions from the FLSA action before it and left open the issue resolved below and in the other appellate decisions rejecting Campbell-Ewald's position. *See* 133 S. Ct. at 1529. Campbell-Ewald's argument is thus reduced to the claim that the courts of appeals have not properly applied some of *Genesis*'s reasoning.

This Court rarely grants certiorari based on such claims of error, *see* S. Ct. R. 10, and there are powerful reasons not to do so here. If Campbell-Ewald were correct that allowing a plaintiff who declines an offer of individual relief to pursue class claims is inconsistent with *Genesis*'s reasoning, some court of appeals in one of the cases raising the issue would likely agree. The absence of such a decision to date not only undermines Campbell-Ewald's assertion that the decision below conflicts with *Genesis*, but also underscores that a decision now is unnecessary. If and when some court of appeals accepts Campbell-Ewald's argument, there will be ample opportunity for review by this Court.

Campbell-Ewald's assertion that the decision below and others like it are clearly wrong under *Genesis* is in any event unpersuasive. As *Genesis* held, an FLSA collective action is no more than a vehicle to which individuals opt in to litigate individual claims; unlike a class action, it does not create a class with "an independent legal status" represented by the named plaintiff. 133 S. Ct. at 1530. While a plaintiff in an FLSA action "has no claim that he is entitled to represent other plaintiffs," *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003), a putative class representative has a cognizable interest in his asserted claim to represent a class. *See id.* at 1244–47 (citing *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980), and *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980)).

Moreover, the FLSA expressly provides that when an individual opts into a collective action, his claims do not relate back to the filing of the complaint. *See* 29 U.S.C. § 256. Thus, the addition of an opt-in plain-

tiff does not, by virtue of relation back, supply a case or controversy at some earlier point in the case. By contrast, when a class is certified the court recognizes the existence of the independent entity whose claims are set forth in the class action complaint filed at the outset of the case. As the courts of appeals have recognized, in such cases there is an earlier event—the filing of the complaint asserting claims on behalf of the class—to which the formal recognition of the class may relate back, supplying the requisite case or controversy throughout the existence of the case. *See Stein*, 722 F.3d at 705–07.

II. This case is not an appropriate vehicle for addressing the mootness issues.

Particularly in light of the other opportunities this Court is likely to have to address the mootness questions Campbell-Ewald raises should a true post-*Genesis* conflict arise, this case would be a poor vehicle for review of the issues, for a number of reasons.

First, Campbell-Ewald's offer was not genuinely an offer of full relief: It offered to pay statutory damages for each message the plaintiff could allege he had received consistent with Rule 11, without specifying how many there were, and it failed to offer attorney fees, though the complaint had specifically requested them. The courts are in complete agreement that an offer that does not provide everything the plaintiff seeks—whether the claims are meritorious or not—cannot moot a claim. *See, e.g.*, *Hrivnak*, 719 F.3d at 567–70.

An offer that seeks to sidestep that requirement by saying the defendant will pay whatever it is liable to pay (contingent on its satisfaction that the plaintiff's allegations satisfy Rule 11) cannot eliminate a case or

controversy because it carries with it the prospect of disagreement over the extent of the defendant's liability and "leaves work to be done to get the case to the finish line." *Keim v. ADF Midatlantic, LLC*, 586 F. App. 573 (11th Cir. 2014); *see also Scott*, 740 F.3d at 1126; *Payne*, 748 F.3d at 608. Thus, the premise of all Campbell-Ewald's arguments—that it offered the plaintiff full relief—is subject to substantial disagreement that could prevent the Court from reaching the questions presented.

Second, the case has the unusual feature that the district court ordered Campbell-Ewald's Rule 68 offer stricken—an element not present in other appellate decisions on the subject. To reach the questions presented, the Court would first have to address the propriety and impact of that order, including whether it negated any effect of the Rule 68 offer as well as whether Campbell-Ewald waived any challenge to the order by not appealing it.

Third, the plaintiff in this case sought class certification as soon as possible under the local rules following the offer, and within the schedule to which both parties stipulated at the outset of the case. Should the Court consider the timing of the motion to certify relevant to whether the plaintiff diligently sought class treatment (as did the Seventh Circuit in *Damasco* and *McMahon*), it would necessarily have to consider the potential impact of this procedural wrinkle, which is specific to this particular case. This aspect of the case further obviates the possibility that it would provide a vehicle for announcing a generally applicable answer to the class mootness issue.

III. Campbell-Ewald's immunity argument does not merit review.

Campbell-Ewald offers no convincing reasons for this Court to review its contention that it has immunity from claims under the TCPA because it was acting under a government contract when it developed the text message campaign and caused transmissions to cell phones without the consent of their owners. Campbell-Ewald cites no authority that supports its broad claim that government contractors have "derivative sovereign immunity" from any claim based on violation of a federal statute in the course of carrying out a contract with the federal government.

A. *Yearsley* created no broad rule of derivative sovereign immunity.

Campbell-Ewald relies primarily on *Yearsley v. W.A. Ross Construction Company*, which provided that a government contractor was not liable for an alleged taking of property caused by its authorized work on a federal public works project, where a remedy for the taking was available directly against the federal government. 309 U.S. at 20–22. *Yearsley*'s narrow holding was that "as the Government in such a case promises just compensation and provides a complete remedy, action which constitutes the taking of property is within its constitutional power and there is no ground for holding its agent liable who is simply acting under the authority thus validly conferred." *Id.* at 21–22.

Campbell-Ewald's claim that the court of appeals was wrong not to extend *Yearsley* to the different circumstances of this case is, again, a claim of error of the type this Court rarely entertains. Moreover, *Yearsley* did not, as Campbell-Ewald asserts, "h[o]ld

that the doctrine of derivative sovereign immunity foreclosed tort claims brought against a private contractor that performed services on behalf of the U.S. government." Pet. 24. *Yearsley* nowhere describes its holding as one concerning "immunity." The word does not even appear in the opinion. And the case in no sense involved "derivative sovereign immunity": It rested largely on the premise that the United States was *not* immune. 309 U.S. at 21. Indeed, neither *Yearsley* nor any other decision of this Court has recognized "derivative sovereign immunity."

Yearsley's holding provides no support for Campbell-Ewald here, as nothing in the opinion suggests a broad immunity for contractors against claims of federal statutory violations committed by federal contractors, for which there is, unlike in *Yearsley*, no "complete remedy" against the government. Moreover, the Ninth Circuit has not disregarded *Yearsley*, but, like other circuits, has applied it principally in cases where federal public works projects have caused property damage for which plaintiffs have sought to hold the contractor liable. *See Myers v. United States*, 323 F.2d 580 (9th Cir. 1963); *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 204–07 (5th Cir. 2009).

B. *Boyle* offers Campbell-Ewald no support.

Boyle v. United Technologies Corp. undermines rather than supports Campbell-Ewald's claim that *Yearsley* establishes a sweeping immunity doctrine. *Boyle*, which established the "federal contractor defense" against state tort liability for federal procurement contractors, cited *Yearsley* only once, as an instance in which the Court had "come close" to recognizing a federal government interest in protecting contractors against liability. 497 U.S. at 506. *Boyle*

went on to hold that that interest could support *conflict preemption* of *state-law* claims against federal procurement contractors, but only in narrowly defined circumstances where there was "significant conflict" between the duty imposed by state tort law and the contractor's federal-law contractual duties. *Id.* at 507. Neither *Boyle*'s holding nor its passing statement that *Yearsley* came "close" to supporting a contractor defense suggests that *Yearsley* is a font of broad, derivative sovereign immunity.

Furthermore, *Boyle* itself creates no such immunity: Its premise is conflict between federal and state law, which, as the court of appeals pointed out, is not implicated here. *Boyle* expressly declined to hold that federal immunity doctrines extend to government contractors. *Id.* at 505 n.1. Moreover, *Boyle* permits a defense only in highly circumscribed conditions, which Campbell-Ewald does not contend are applicable here.[9] And there is no basis whatsoever for suggesting that the decision in this case reveals any failure by the Ninth Circuit to follow *Boyle*. Rather, the court has properly applied the federal contractor defense to cases within its scope. *See, e.g., Leite v. Crane Co.*, 749 F.3d 1117, 1123 (9th Cir. 2014).

Invocation of *Boyle* is particularly inapt because, as this Court recently explained, whether a federal

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[9] Those circumstances exist where "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 512. Campbell-Ewald's contract did not specify that it must commit TCPA violations; indeed, it prohibited Campbell-Ewald from doing so.

statutory claim is precluded is a different matter from whether a state-law claim is preempted. *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014). Preemption may result from implied conflict with a federal statute or even (as in *Boyle*), federal interests reflected in "a federal agency action." *Id.* Displacement of liability under a federal statute, by contrast, generally requires a conflicting federal statute, and even then the question is a matter of "statutory interpretation" guided by such principles as the presumption against implied repeal and the reconciliation of general and specific statutory commands. *Id.* at 2236–37. Absent a countervailing statutory command, the creation of an exemption from liability based merely on the asssertion that a federal statutory claim would run counter to the kind of nonstatutory "federal interest" that supports the *Boyle* preemption defense would be unusual, at best. Campbell-Ewald cites no authority for such a defense and advances no argument grounded in statutory interpretation for excusing it from TCPA liability.

C. There is no intercircuit conflict.

Lacking genuine support in either *Yearsley* or *Boyle*, Campbell-Ewald contends that decisions of other circuits have given *Yearsley* a broader scope than did the Ninth Circuit below and have extended it to cases outside public works projects. With one exception, however, each of the cases Campbell-Ewald cites is a pre-*Boyle* case in which a court of appeals briefly cited *Yearsley* by analogy on the way to anticipating *Boyle*'s holding that a federal contractor can claim a preemption defense to a state-law tort claim that conflicts with the contractor's federal-law contract duties. *See Tozer v. LTV Corp.*, 792 F.2d 403 (4th

Cir. 1986); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352 (3d Cir. 1985); *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985); *Burgess v. Colo. Serum Co.*, 772 F.2d 844 (11th Cir. 1985). The Ninth Circuit's pre-*Boyle* precedent likewise recognized a preemption defense for government procurement contractors and similarly cited *Yearsley* as part of the background for recognizing the defense. *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983).

These decades-old decisions are now subsumed within, and superseded by, the government contractor preemption defense as defined by this Court in *Boyle*. To the extent they might have recognized the existence of such a defense in broader circumstances than *Boyle*, *Boyle*'s limits displace their holdings. *See, e.g.*, *Boyle*, 497 U.S. at 510 (disapproving *Tozer*, *Tillett*, and *McKay* as "too broad" to the extent they would prohibit suit against a contractor whenever the Federal Tort Claims Act barred suit against the government). The holdings of these cases are principally of historical interest as wayposts in the development of the *Boyle* government contractor defense. They have no continuing vitality as establishing a broader "derivative sovereign immunity" doctrine, and they cannot implicate any current conflict over the existence or scope of such immunity.

The one appellate decision Campbell-Ewald cites that is not a precursor to *Boyle*'s federal contractor preemption defense is *Butters v. Vance International, Inc.*, 225 F.3d 462 (4th Cir. 2000), but that case is even further afield: It held that a contractor of a foreign government acting at that government's orders was entitled to immunity under the Foreign Sovereign Immunities Act. Although it cited *Yearsley* at one

point as an *example* of circumstances where a contractor has a defense for actions taken on behalf of a government, *see id.* at 466,[10] it did not hold that a federal contractor has immunity for claims based on federal statutory violations, and it has no bearing on that issue. Whatever the correctness of *Butters*'s construction of the Foreign Sovereign Immunities Act, its holding does not remotely conflict with that of the court in this case.

Any assertion that the result below conflicts with Fourth Circuit case law is negated by that court's subsequent decision in *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326 (4th Cir. 2014), which Campbell-Ewald does not mention, though it was cited below. *KBR* holds, consistent with the court of appeals in this case, that any immunity *Yearsley* might otherwise confer on a contractor is negated if the contractor "exceeded its authority under the contract," and that it is not enough for a contractor to "stay[] within the thematic umbrella of the work that the government authorized" if, as here, it failed to "adhere to the government's instructions." *Id.* at 345; *see* Pet. App. 20a (pointing to evidence that Campbell-Ewald acted contrary to Navy policy). *KBR*, in turn, relied on Ninth Circuit precedent, underscoring the absence of conflict. 744 F.3d at 345.[11]

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[10] The court in *Butters* mischaracterized *Yearsley* as being based on derivative sovereign immunity, but that mistake in nomenclature does not evidence a circuit split.

[11] In addition, *KBR* involved only state tort claims, and its recognition that a contractor has a defense against such claims if its actions are confined to those specifically authorized by contract does little more than replicate *Boyle*'s preemption doctrine.

Campbell-Ewald has thus adduced nothing to contradict the court of appeals' observation that *Yearsley* has "never been invoked to preclude litigation of a dispute like [this] one." Pet. App. 16a. Absent any disagreement among the lower courts, there is no reason for this Court to consider creating a new doctrine that allows federal contracts to confer broad immunity on private actors against claims based on federal statutory violations.

D. *Filarsky* has no bearing on this case.

Campbell-Ewald's reliance on *Filarsky v. Delia*, 132 S. Ct. 1657 (2012), as additional support for immunity is misplaced. *Filarsky* concerns official immunity under 42 U.S.C. § 1983, which protects government officials, not corporate contractors. *Filarsky* extended such immunity to individuals who, though not regular government employees, perform "government duties" otherwise executed by public officials. *Id.* at 1666. *Filarsky* reflects concerns about protecting the "decisiveness" of such officers, preventing "unwarranted timidity," and ensuring that candidates are not "deterred from public service" by the threat of distinctive liabilities based on actions under color of law. *Id.* at 1665. Those concerns are absent where, as here, a profit-making corporation faces potential liability under generally applicable laws that create no greater exposure to, or liability for, claims based on work for the government than for identical work on behalf of private clients. *Filarsky* recognized that official immunity is unwarranted where such "incentives characteristic of the private market" hold sway. *Id.* at 1667.

IV. Campbell-Ewald's policy arguments offer no reason to grant review.

Campbell-Ewald attempts to bolster its arguments for review by attacking TCPA class actions as an "extortionate weapon." Pet. 2. Campbell-Ewald's argument is with Congress, which it acknowledges provided statutory damages of "$500 per violation ... for unauthorized messages." *Id.*; *see* 47 U.S.C. § 227(b)(3) (providing for actual damages or $500 statutory damages, whichever is greater, and allowing treble damages for willful or knowing violations). There is nothing extortionate about seeking to hold a company alleged to be responsible for tens of thousands of violations liable for the damages authorized by Congress. Campbell-Ewald's claim that "every American business" is at risk of ruinous TCPA liability, Pet. 28 n.6, not only "assumes 'a shocking decree of noncompliance' with the Act," *Mims v. Arrow Fin. Servs., LLC*, 13 S. Ct. 740, 752 (2012), but is wildly implausible to boot. Most American business do not deluge consumers with unwanted text messages and cell-phone calls using automated dialers, make robocalls to home telephones, send junk faxes, or make calls to numbers on the do-not-call list, the principal actions prohibited by the TCPA. *See* 47 U.S.C. §§ 227(b)(1), (c)(5).

If the liabilities imposed by the TCPA were excessive, Congress could change them, which it has declined to do.[12] Absent such action, this Court should not allow serial violators to escape suits claiming damages authorized by law for thousands of violations

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[12] The Mobile Informational Call Act of 2011, H.R. 3035, which was strongly supported by amicus U.S. Chamber of Commerce, would have limited the TCPA but was not enacted.

by merely *offering* to pay a nominal sum for a handful of violations, or to avoid liability altogether by invoking an "immunity" unintended by Congress. To the extent policy considerations are relevant, they weigh strongly against allowing defendants to opt out of substantial damages liability by offering trifling amounts to pick off class plaintiffs, *see Roper*, 445 U.S. 338; *see also id.* at 341–42 (Rehnquist, J., concurring), or permitting government agencies unwittingly to grant contractors immunities against statutory claims that Congress did not intend to confer.

The Article III jurisdictional principles and immunity doctrines Campbell-Ewald asks this Court to distort would not be limited to TCPA cases. Judicial decisions about these matters of broad application should be driven by legal principles, not differences of opinion about whether particular substantive claims created by Congress reflect good policy.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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ARGUMENT

Respondent submits this supplemental brief to advise the Court of developments that may affect the Court's consideration of the first and second questions presented in Campbell-Ewald's petition, concerning whether an unaccepted offer of judgment for individual relief to the named plaintiff in a putative class action eliminates any justiciable case or controversy presented by the action.

On April 9, 2015, the Advisory Committee on Civil Rules met in Washington, D.C., to discuss possible amendments to the Federal Rules of Civil Procedure, including Rule 23. The Advisory Committee's Rule 23 Subcommittee reported that it is considering a number of proposals affecting Rule 23, including proposals that would (1) provide that a tender of relief to a class representative can result in termination of a class action only if the district court has already denied class certification; (2) prohibit Rule 68 offers of judgment in actions invoking Rule 23 (both pre- and post-certification); and/or (3) require judicial approval of pre-certification individual settlements of actions filed as Rule 23 class actions.[1]

The Advisory Committee's consideration of rules changes that would affect the issues raised by the pe-

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[1] The alternatives being considered by the Rule 23 Subcommittee are set forth in the Advisory Committee's Agenda Book for the meeting, which is available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2015-04.pdf. The Rule 23 Subcommittee Report begins on p. 243 of the Agenda Book, and also has its own page numbers. The description of the alternatives the Subcommittee has suggested with respect to offers of judgment is found at pp. 277–80 of the Agenda Book (pp. 35–38 of the Subcommittee Report).

tition for certiorari, and that collectively are aimed at preventing potential class actions from being scuttled by offers aimed at "picking off" the named plaintiffs, is another reason for this Court to decline Campbell-Ewald's invitation to step into these issues now. The rulemaking process is likely to be an effective way of ensuring uniformity of practice among the circuits. Moreover, to the extent that Campbell-Ewald argues that policy considerations favor allowing defendants to avoid class actions through pick-off offers to individual plaintiffs (*see* Pet. 2, 27–29), the rulemaking process is likely to be a superior way of considering and resolving the competing policy arguments that bear on the question. As this Court has recognized, "the rulemaking process has important virtues. It draws on the collective experience of bench and bar, ... and it facilitates the adoption of measured, practical solutions." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114 (2009); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

Just as the appellate courts are only beginning to address these issues in light of *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), the rulemaking process has also only recently gotten underway. The Court should allow both the appellate and rulemaking processes to proceed, as the outcome of one or the other (or both) is likely either to obviate any need for review by this Court or, if review ultimately becomes necessary, to better inform that review.

Of course, the rulemaking process does not directly resolve legal issues that go to the existence of Article III jurisdiction. But by establishing the procedural consequences of particular actions taken by the parties—such as the defendant's proffering of an offer

and the plaintiff's declining to accept it—the rules can both frame and affect the outcome of jurisdictional disputes. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999). Justice Kagan's discussion of the supposed mootness consequences of Rule 68 offers in her *Genesis* dissent illustrates the point. *See* 133 S. Ct. at 1534 (pointing out that Rule 68(b)'s provision that unaccepted offers are "considered withdrawn" is inconsistent with the position that such offers moot a plaintiff's claims).

Likewise, the alternatives under consideration by the Advisory Committee would affect resolution of the mootness arguments Campbell-Ewald advances by making clear that the rules do not authorize the termination of a prospective class representative's individual claim through entry of judgment or dismissal based on an offer of complete individual relief. The proposals would thus foreclose the argument that the individual plaintiff's case is "over" or that he has "won" merely by having received an offer and that he therefore can no longer pursue class certification because he has no remaining case or controversy with the defendant.

Such rules would greatly reduce the likelihood that divergences in practice among the circuits would develop or persist in the wake of *Genesis*. Should a federal appellate court nonetheless, at some future date, rule that an offer of individual relief moots a plaintiff's ability to pursue a class action—and there has as yet been no such ruling since *Genesis*—this Court could then determine whether review was required. But for the present, this Court should stay its hand in light of the ongoing consideration of these issues by the Advisory Committee and the appellate courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

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JOSE GOMEZ,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION

The circuits are undeniably divided on the important jurisdictional question of whether, or when, a case no longer presents an actual case or controversy under Article III because the plaintiff received an offer of complete relief. Pet. 13-18. This Court granted certiorari to resolve that question in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), but was unable to do so because of a procedural flaw that came to light after it granted certiorari. *Id.* at 1529. This case presents a clean opportunity to decide the issue left open in *Genesis Healthcare*, as well as the related—and equally important—question of when an offer of complete relief moots a class claim. *See* Amicus Br. for Chamber of Commerce of U.S. *et al.* (Chamber Br.). Respondent does not seriously dispute any of that. Instead, his central submission is that there is no need for this Court to decide this issue because the *dissent* addressed it in *Genesis Healthcare*. Opp. 2-3, 7-15. That contention should be rejected.

First, the dissent obviously did not—and could not—resolve the circuit conflict. Second, what the Court did say in *Genesis Healthcare*—along with the Court's other "case and controversy" decisions—directly undercuts the dissent. *See infra* at 5-7. And third, whether a majority of the Court agrees with the dissent or not, the Court should grant certiorari and decide the issue for itself. If the Court agrees with the dissent, it should say so and finally eliminate the conflict and confusion on this important and recurring jurisdictional issue. And if the Court does not, then that is all the more reason to grant review now, instead of standing by while lower courts, like the Ninth Circuit, disregard fundamental Article III limits.

Indeed, one of the great costs of failing to respect Article III's case-and-controversy requirement is that it leads courts unnecessarily to "expound[]" on the law. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). Here, the Ninth Circuit expounded an extraordinarily limited conception of the important derivative-sovereign immunity rule of *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940). The response just confirms that the Ninth Circuit has severely limited *Yearsley* and underscores that this issue warrants this Court's review as well.

ARGUMENT

I. THE JURISDICTIONAL QUESTIONS WARRANT REVIEW

A. The Circuits Are Indisputably Split

Respondent perplexingly argues that this Court did not determine that the jurisdictional issue warranted certiorari in *Genesis Healthcare*. Opp. 8. Wrong.

In *Genesis Healthcare*, the Court granted certiorari to decide the question "[w]hether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims." Pet. i (11-1059). The Court began its decision by addressing "whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot," noting that the circuits are "split" on this issue and that the lower courts below had concluded that petitioners' offer of complete relief "mooted" the plaintiff's claim. 133 S. Ct. at 1528-29. But the Court determined that it could not "reach this question, or resolve the split," because of a procedural issue not present here. *Id.*

That the Court was unable to *reach* "the question

whether an offer of judgment moots an individual claim" hardly means, as respondent posits, that the Court determined that this issue did not "*warrant[]* review." Opp. 8 (emphasis added). This Court necessarily determined that this issue warranted review when it granted certiorari to decide it. Precisely because this Court was unable to resolve this issue in *Genesis Healthcare*, the circuit conflict recognized in *Genesis Healthcare* still exists. That conflict not only is as certworthy today as it was at the time of *Genesis Healthcare*, but it is *more* certworthy in light of the added confusion that has ensued in the wake of *Genesis Healthcare*. Pet. 17-18.

Ultimately, respondent's contention is that this conflict no long matters because the dissent in *Genesis Healthcare* correctly answered the question. Opp. 8-14. But that argument just begs the question *the Court* should grant certiorari to decide—and incorrectly assumes the dissent was right. *Infra* at 5-7. Moreover, respondent's proposed solution of waiting some untold number of *additional* years to see what happens is impractical. The threshold jurisdictional issue presented is recurring frequently. But not a single circuit has flipped its position on this issue in the two years since *Genesis Healthcare*—belying the notion that this conflict will just fade away. The only thing that has changed is that the *Genesis Healthcare* dissent has hardened the position of the courts on the "no mootness" side of the conflict, while putting other courts in a difficult position with its blunt admonition, "Don't try this at home." 133 S. Ct. at 1534.

Respondent is also wrong that *Genesis Healthcare* obviates the need to resolve the related question of whether, or when, an offer of complete relief moots a

class claim. Recognizing that *Genesis Healthcare* undermines the reasoning courts had followed in extending the relation-back doctrine to this context, courts have tried to justify their decisions by relying on differences between FLSA collective actions and Rule 23 class actions. *See* Pet. App. 6a; *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 708 (11th Cir. 2014); Opp. 16-18. But as petitioner has explained, before a district court rules on class certification, a plaintiff bringing representative claims under Rule 23 occupies the same position as a plaintiff bringing representative claims under the FLSA. Pet. 20. Just as in *Genesis Healthcare*, that putative class representative has no "personal stake" in representing unnamed class members that would "preserve [the] suit from mootness." 133 S. Ct. at 1530. The lower courts' reliance on this faulty distinction is further reason to grant certiorari now and prevent further misapplication of *Genesis Healthcare*.

There is no reason to wait any longer to resolve the conflict. The jurisdictional issues were adequately fleshed out when the Court granted certiorari in *Genesis Healthcare* and are only more developed now. The issue is recurring, especially as the wave of TCPA class actions grows. *Infra* at 9. The viability of such actions after a defendant has made an offer of complete relief should not depend on whether they are filed in one circuit, or another. That is true for defendants in circuits, like the Ninth, that hold that an offer of complete relief does not moot a claim, just as it is for plaintiffs in circuits, like the Seventh, that hold that an offer of complete relief *does* moot a claim. Pet. 14-15.

The real-world impact of this conflict is undeniable. In the wake of *Stein*, for example, the Eleventh Circuit

already has thrice reversed orders dismissing TCPA class actions as moot because defendants made offers of full relief. *Walker v. Financial Recovery Servs., Inc.*, No. 14-13769, 2015 WL 1383233 (11th Cir. Mar. 27, 2015); *Barr v. Harvard Drug Grp., LLC*, 591 F. App'x 928 (11th Cir. 2015), *petition for cert. filed*, No. 14-1194 (Jan. 29, 2015); *Keim v. ADF Midatlantic, LCC*, 586 F. App'x 573 (11th Cir. 2014). Meantime, lower courts continue to acknowledge the circuit conflict and the need for guidance from this Court. *Swanigan v. City of Chicago*, 775 F.3d 953, 960 n.3 (7th Cir. 2015); *Suttles v. Specialty Graphics, Inc.*, No. A-14-CA-505 RP, 2015 WL 590241, at *3 & n.2 (W.D. Tex. Feb. 11, 2015). And courts have recognized that, because this Court did not decide the jurisdictional issue in *Genesis Healthcare*, pre-*Genesis Healthcare* circuit law remains binding. *Suttles*, 2015 WL 590241, at *3; *Sebestyen v. Leiken, Ingber & Winters, P.C.*, No. 13-cv-15182, 2015 WL 1439881, at *7 (E.D. Mich. Mar. 27, 2015).

In short, review is needed now.

B. The *Genesis Healthcare* Dissent is Not "Unrebutted"

A central premise of the response is that the *Genesis Healthcare* dissent is "unrebutted" (Opp. 7)—and *unrebuttable* (*id.* at 14-15). Of course, that goes to the merits of the jurisdictional issues—a question for plenary review. In any event, respondent is wrong.

As *the Court* reiterated in *Genesis Healthcare*, Article III "restricts the authority of federal courts to resolving '"the legal rights of litigants in actual controversies."'" *Genesis Healthcare*, 133 S. Ct. at 1528 (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (internal citation

omitted)). Such a controversy must exist at "*all* stages of federal judicial proceedings." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (emphasis added). "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Id.* (citation omitted).

When a defendant offers a plaintiff complete relief on his claim, the plaintiff no longer has a "'personal stake'" sufficient to confer jurisdiction under Article III, *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) (citation omitted), and there is no longer a "'real and substantial controvers[y]'" triggering the jurisdiction of the courts, *Lewis*, 494 U.S. at 477 (alteration in original) (citation omitted). When a defendant has agreed to give the plaintiff all that he seeks—and to have judgment entered against it—a case cannot have "direct consequences on the parties involved." *Genesis Healthcare*, 133 S. Ct. at 1528. There is no longer any injury that can "be 'redressed by a favorable decision,'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted), and the case must be dismissed as beyond the province of the federal courts.

The central premise of the dissent in *Genesis Healthcare* is that a case cannot become moot unless the plaintiff has actually *accepted* such an offer. But the Court in *Genesis Healthcare* cast doubt on, if not rejected, that very premise. As the Court explained, "Courts of Appeals on both sides of [this jurisdictional] issue have recognized that a plaintiff's claim may be satisfied even *without* the plaintiff's consent." 133 S. Ct. at 1529 n.4 (emphasis added). In other words, Article III does not grant a plaintiff an exclusive on-off switch for Article III jurisdiction by deciding whether to accept, or deny, an offer of complete relief. When

the plaintiff has been offered complete relief, it is not the prerogative of the federal courts to plunge ahead—and expound on the law—simply for sport.

To get to this result, some courts have held that "an unaccepted offer of complete relief alone is sufficient to moot the individual's claim." *Genesis Healthcare*, 133 S. Ct. at 1529 n.4. Other courts have held that, "in the face of an unaccepted offer of complete relief, district courts may 'enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment,'" which would also moot the plaintiff's case. *Id.* (quoting *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 575 (6th Cir. 2009)); *see McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 342 (2d Cir. 2005). In *Genesis Healthcare*, the United States recognized the "legitimate impulse" that a court should not "expend judicial and litigation resources resolving the merits of a claim that the defendant informs the court it will fully satisfy," and argued that the latter approach was the "'better'" way to address that impulse. U.S. Br. 13-14 (11-1059) (citation omitted). And even the respondent there agreed that "it is possible for a court to enter a default judgment and *force* relief upon the plaintiff." Arg. Tr. 30 (11-1059) (emphasis added). But either approach answers the *Genesis Healthcare* dissent.

The questions presented readily encompass both of these approaches, just as the jurisdictional question did in *Genesis Healthcare*. And the petition discusses (at 14-17), and advances (at 17), both approaches as ways of answering the jurisdictional questions presented.

C. The Alleged Vehicle Issues Are Illusory

As a last-ditch measure, respondent renews the same vehicle arguments he unsuccessfully advanced below. Opp. 23-24. Both courts below rejected the

same arguments and squarely reached and resolved the jurisdictional issues. The arguments still lack merit.

First, respondent claims that "Campbell-Ewald's offer was not genuinely an offer of full relief." Opp. 23. But he ignores the terms of the offers (Pet. App. 52a-61a), not to mention the district court's finding that "[t]he parties do not dispute that Defendant's Rule 68 Offer would have fully satisfied the individual claims asserted, or that could have been asserted, by Plaintiff in this action," *id.* at 40a. The offers would have more than trebled the damages for any violation, and attorney's fees are not authorized under the TCPA. Pet. CA9 Reply 6-7, ECF No. 16-1 (9th Cir. Aug. 9, 2013). Moreover, the Ninth Circuit likewise decided this case on the premise that the offers *do* "'fully satisfy'" respondent's claim. Pet. App. 5a.

Second, respondent says that the district court "ordered Campbell-Ewald's Rule 68 offer stricken." Opp. 24. That is a red herring. The district court simply struck the written "*notice* of offer of judgment" filed with the district court with the Rule 68 offer—not the offer itself. Pet. App. 38a (emphasis added), 49a. The court granted the motion to strike because, by the terms of the Rule 68 offer, written *notice* is not required unless the plaintiff accepts the offer. *Id.* at 49a. The district court did not, and could not, eliminate the offer itself; both the Rule 68 and separate settlement offer are in the record below and before this Court (*id.* at 52a-61a); and courts routinely look to the offer of judgment—whether or not accepted or even stricken—to determine whether a case is moot.

Third, respondent points to the fact that the parties agreed to a schedule for a class certification motion. Opp. 24. That has no bearing on whether petitioner's

offer of complete relief mooted respondent's *individual* claim. And the Ninth Circuit properly excluded this from the analysis of whether the offer of complete relief mooted the *class* claim. As petitioner has explained, what matters is not the schedule for filing a class certification motion, but whether the offer of complete relief is made before, or after, any class is actually *certified* by the court. Pet. 18-21.

D. The Issues Are Undeniably Important

Respondent does not seriously try to dispute the importance of the jurisdictional issues. The issues concern a matter of threshold importance governing the authority of the courts. Moreover, as the amici Chamber of Commerce and Business Roundtable have explained, the types of "headless" class actions at issue "encourage[] lawsuits and discourage[] settlements," harming the judicial system and undermining the federal policy of promoting settlement. Chamber Br. 3, 13-17. TCPA class actions, in particular, are now sweeping the federal courts. Pet. 27-28 & n.6. Allowing plaintiffs to press forward with such class actions after a defendant has offered them complete relief subverts the ordinary incentives and is a recipe for class action abuse. Chamber Br. 15-17.

II. THE IMMUNITY QUESTION WARRANTS REVIEW

On the derivative-immunity question, respondent just doubles down on the Ninth Circuit's remarkable position on *Yearsley*. *See* Pet. 23-27. He does not dispute that the Ninth Circuit has categorically confined *Yearsley's* derivative-immunity rule to cases involving "federal public works" and "property damage." Opp. 26. And he goes even further than the

Ninth Circuit by arguing that *Yearsley* "in no sense involved 'derivative sovereign immunity,'" and, indeed, does not "concern[] 'immunity'" at all. *Id.*

That extreme reading of *Yearsley* conflicts with the vast majority of courts that, like this Court and the Solicitor General, have recognized that *Yearsley* establishes a general derivative-immunity rule. *See* Pet. 26-27; *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583 (1943); *KBR v. Metzgar*, U.S. Br. 4-5, 18-19 (13-1241) (recognizing that *Yearsley* establishes a principle of "derivative sovereign immunity"); *see also KBR v. Metzgar*, Amicus Br. for the Associated Gen. Contractors of Am. *et al.* 7-10 (13-1241) (discussing importance and widespread application of *Yearsley*'s "doctrine of derivative sovereign immunity").*

Respondent's claim that *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), sheds no light on this issue, or even "supercede[s]" *Yearsley*, is likewise incorrect. Opp. 26-27, 29. Although the result

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* *See also, e.g., Metzgar v. KBR, Inc. (In re KBR, Inc.)*, 744 F.3d 326, 342 (4th Cir. 2014) ("The concept of derivative sovereign immunity stems from [*Yearsley*] . . . ."), *cert. denied*, 135 S. Ct. 1153 (2015); *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 204 (5th Cir. 2009) ("Contractor Defendants are entitled to government-contractor immunity under *Yearsley*."); *McCue v. City of N.Y. (In re World Trade Ctr. Disaster Site Litig.)*, 521 F.3d 169, 196 (2d Cir. 2008) ("Derivative immunity was first extended to private contractors in *Yearsley* . . . ."); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1343 (11th Cir. 2007) ("The doctrine of derivative sovereign immunity had its origin in *Yearsley* . . . ."); *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (discussing *Yearsley* and "well-settled law that contractors and common law agents acting within the scope of their employment for the United States have derivative sovereign immunity"); *Carley v. Wheeled Coach*, 991 F.2d 1117, 1120 (3d Cir.) (recognizing *Yearsley*), *cert. denied*, 510 U.S. 868 (1993).

in *Boyle* is ultimately grounded in preemption rather than immunity principles, the Court's decision belies the Ninth Circuit's limiting reading of *Yearsley*, not to mention respondent's remarkable position (*id.* at 26) that *Yearsley* does not concern immunity at all. *See* Pet. 25-26; *KBR, Inc. v. Metzgar*, U.S. Br. 19 (explaining that "*Boyle* relied on this Court's discussion of derivative sovereign immunity in *Yearsley*").

Certiorari is thus also warranted to review the Ninth Circuit's ruling that derivative immunity is categorically inapplicable to government contractors, like petitioner, engaged in more modern activities like helping the Nation's military harness 21st century communications technology for recruiting.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 14-857

In the Supreme Court of the United States

CAMPBELL-EWALD COMPANY,
Petitioner,

v.

JOSE GOMEZ,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF

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United States Courts, How the Rulemaking Process Works, *available at* http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works.aspx 2

Up to this point, respondent's position has been that the Court need not grant review of the important questions presented because the *dissent* resolved them in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). Now respondent suggests that this Court should hold off review because of "proposals" discussed at a recent meeting of the Advisory Committee on Civil Rules (Civil Committee). Suppl. Br. 1. That attempt to stave off review is even more speculative and less persuasive than respondent's reliance on the *Genesis Healthcare* dissent. To the extent that the Civil Committee discussion of these issues bears on the petition at all, it just underscores the importance of these issues and need for guidance from *this Court*.

1. First, some perspective. The "proposals" (*id.*) respondent touts are just a part of a range of "conceptual sketches" being contemplated by a "Rule 23 Subcommittee." Advisory Committee on Civil Rules, Rule 23 Subcommittee Report, Advisory Committee Agenda Book (Agenda Book) 243-44 (2015), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2015-04.pdf. And that Subcommittee makes one "key point" in its report to the Civil Committee: **"there is no assurance that the Subcommittee will ultimately recommend any amendments."** *Id.* at 244 (emphasis in original). Rather, the Subcommittee is in the early process of "becom[ing] fully informed about pertinent issues regarding Rule 23 practice today." *Id.* at 243. As its report emphasizes, "[t]**hese conceptual sketches are not intended as initial drafts of actual rule change proposals, and should not be taken as such.**" *See id.* at 244 (emphasis in original). The Subcommittee has not even determined "whether a

rule-based solution would be wise." *Id.* at 325.

Even if the Subcommittee *actually* decided to propose an amendment, it would simply commence a lengthy process in which the proposal could be altered or scrapped. First, the Civil Committee would have to adopt the proposal and report it to the Committee on Rules and Practice and Procedure (Standing Committee). Second, the Standing Committee would have to agree to publish the proposed amendment for notice and comment. Third, based on the public comments that are received, the Civil Committee could "then choose to discard, revise, or transmit the amendment as contemplated to the Standing Committee."[1] Fourth, even if there were no changes, the Standing Committee would have to approve the amendment. Fifth, this Court would then consider the amendment. And finally, if this Court did approve an amendment, Congress would have the opportunity to override it. In the rosiest scenario for proponents of any amendment, this process would take years—and would require this Court's review in any case.

Moreover, such efforts have failed in the past. Even before this Court's decision in *Genesis Healthcare*, the Civil Committee attempted and failed numerous times to amend Rule 68 to address the issues the Rule 23 Subcommittee is now pondering. *See Weiss v. Regal Collections*, 385 F.3d 337, 344 n.12 (3d Cir. 2004). Respondent must know this. The Agenda Book he brings to the Court's attention states that "[t]he committee has studied [Rule 68] twice in the last

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[1] United States Courts, How the Rulemaking Process Works, *available at* http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works.aspx.

two decades, and it provoked a storm of controversy both times." Agenda Book 29; *see id.* at 63-64 (discussing history of proposed revisions); *id.* at 223 ("Past efforts to revise Rule 68 have collapsed. Proposals published for comment in 1983 and 1984 met bitter resistance. A proposal developed some 20 years ago eventually fell under its own weight as the draft was revised to reflect a continually growing number of complications."). There is no reason to assume that any proposed amendment would fare differently today.

Such highly preliminary and speculative "developments" (Suppl. Br. 1) provide no reason for delaying this Court's review of these important issues.

2. In any event, respondent concedes that "the rulemaking process does not directly resolve legal issues that go to the existence of Article III jurisdiction." *Id.* at 2. Nor can an Advisory Committee enlarge or abridge substantive rights, 28 U.S.C. § 2072(b))—such as a plaintiff's dubious right to pursue a "headless" class action or a defendant's right to avoid having to defend in federal court a case that presents no justiciable case or controversy. These are the jurisdictional questions at the heart of the petition. *See* Pet. i. Respondent's reliance on theoretical amendments to Rule 68 or Rule 23 (Suppl. Br. 1) also fails to account for the fact that petitioner has a separate settlement offer not governed by Rule 68 and that offer accordingly may not be affected at all by any possible amendment. Pet. 28; Pet. App. 57a-61a. And the Subcommittee's ruminations do not address the first question presented, concerning whether an offer of complete relief moots an *individual* claim.

Ultimately, the Subcommittee's consideration of these issues just confirms the need for this Court's

review. The very fact that the Subcommittee is raising these issues highlights the importance and recurring nature of questions concerning the effect of offers of full relief on individual claims and class actions alike. Moreover, the Agenda Book materials confirm the circuit conflict—denied by respondent, Opp. 19-21—over whether an offer of complete relief moots a plaintiff's *class* claims, and the need for *this Court* to resolve that conflict. *See* Agenda Book 277. As the Chief Rules Committee Officer for the Administrative Office of the U.S. Courts put it, following *Genesis Healthcare*, the practice of "tendering full relief at the outset [of class actions] seems likely to continue until the Court resolves a current split between the [S]eventh [Circuit] and four other circuits as to whether such a plaintiff can continue to maintain the class action in the presence of such an offer." *Id.* at 229.

To deny review now would result only in additional years of conflict in the lower courts on these important jurisdictional issues—in contravention of Article III and to the detriment of numerous class action plaintiffs and defendants alike on both sides of the issues. Like his attempt to avoid review by pointing to the *Genesis Healthcare* dissent, respondent's proposal to avoid review based on the most speculative of theoretical rule changes is designed solely to serve one interest: avoiding plenary review of *this case*. The issues presented are far too important, and are recurring far too frequently across the country, to allow the conflict and confusion over these issues to persist any longer.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim.

2. Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified.

3. Whether the doctrine of derivative sovereign immunity recognized in *Yearsley* v. *W.A. Ross Construction Co.*, 309 U.S. 18 (1940), for government contractors is restricted to claims arising out of property damage caused by public works projects.

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae the Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing 300,000 direct members and representing indirectly the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States. An important function of the Chamber is to represent the interests of its members by participating as *amicus curiae* in cases involving issues of national concern to American business, including cases raising significant questions for companies subject to potential class actions and collective actions. *See, e.g.*, *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1528 (2013) (addressing the effect of an unaccepted Rule 68 offer on an FLSA collective action where Chamber submitted petition- and merits-stage *amicus* briefs); *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011) (addressing standard for class certification in case where Chamber submitted petition- and merits-stage *amicus* briefs).

The Business Roundtable ("BRT") is an association of chief executive officers of leading U.S. companies that together have $7.2 trillion in annual revenues and nearly 16 million employees. BRT member

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[1] Pursuant to this Court's Rule 37.2(a), *amici* timely notified all parties of their intention to file this brief, and letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

companies comprise more than a quarter of the total value of the U.S. stock market and pay more than $230 billion in dividends to shareholders. The BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy, and participate in litigation as *amici curiae* where, as here, significant business interests are at stake.

The Chamber and BRT are committed to filing briefs in important cases that offer opportunities for this Court to clarify the law and thus help facilitate their members' compliance with it, including with the statute at issue here, the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.* Many of the nation's businesses dedicate significant time, energy, and resources to achieve such compliance. These efforts are undermined by the burdens and expenses of defending private lawsuits prosecuted not by plaintiffs with a personal stake in the outcome as required by Article III, but by lawyers in search of attorneys' fees. The Ninth Circuit in this case, in direct contravention of this Court's Article III jurisprudence, sanctioned exactly such lawyer-driven suits by holding, in conflict with several other circuits, that putative class actions may continue even though the defendants have offered the only named plaintiff complete relief and no other person has affirmatively joined the suit. *Amici* therefore submit this brief to explain the importance of the issues presented by the Petition and the urgent need for this Court's review.

SUMMARY OF ARGUMENT

This case presents the important question whether class action lawsuits may proceed even after a full settlement offer has mooted the only named

plaintiff's claim. Such "headless" class actions cannot be squared with Article III, Rule 23, due process, and fundamental principles of legal ethics, as the Fourth, Seventh, and Eighth Circuits have recognized. Pet. for Writ of Cert. 22. Yet in the Third, Fifth, Ninth, Tenth, and Eleventh Circuits, class actions may continue without a named plaintiff who has an active stake in the litigation. *Id.* at 21.

Allowing such class actions to proliferate harms defendants and the judicial system alike, because it encourages lawsuits and discourages settlements. It especially harms plaintiffs, who may succumb to pressure to reject full settlement offers—thereby assuming liability for Rule 68 costs at the conclusion of the case—all so that putative class counsel can pursue the lawsuit on a classwide basis in hopes of obtaining substantial legal fees.

Certiorari is warranted to resolve the conflict among the courts of appeals on this important issue and to stop this dangerous trend in class litigation for several reasons.

First, allowing a putative class action to continue when there is no live controversy between the named plaintiff and the defendant violates Article III's case or controversy requirement, harms plaintiffs, and invites gamesmanship. Specifically, the decision below allows putative class counsel to maintain federal lawsuits for their own financial benefit—even where their only client stands to gain nothing, but potentially to lose much, by rejecting a full settlement offer. Article III prohibits the use of federal courts to litigate cases in which no plaintiff has any actual stake in the litigation.

Second, the rule adopted by the Ninth Circuit below does violence to Rule 23(a)(4)'s adequacy requirement, which requires that "the representative parties will fairly and adequately protect the interests of the class," by driving a wedge between the interests of putative class counsel and the named class representatives. It does so by incentivizing lawyers to encourage their clients *not* to accept full settlement offers and to assume the hefty risks of litigating in the face of a Rule 68 offer simply to keep putative class actions alive. And it effectively guts the commonality and typicality requirements of Rule 23(a)(2) and (a)(3), because a named plaintiff with a moot claim cannot "'possess the *same interest* and suffer the same injury' as the class members." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 625–26 (1997) (emphasis added).

Third, a rule that a full settlement offer moots a class action is consistent with this Court's precedents and with the policy considerations animating the applicable statutes. This is particularly true in the context of statutes with reticulated damages provisions such as the TCPA, which contemplates that a defendant will pay statutory damages only to the handful of plaintiffs who feel aggrieved enough to sue over an errant telemarketing phone call or text message, and not be subjected to potentially ruinous liability to hundreds of thousands of unnamed, absent individuals.[2]

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[2] This case also presents the related question whether an unaccepted settlement offer for complete relief in fact moots a plaintiff's claim. Petitioner Campbell-Ewald persuasively demonstrates that such an offer does render the plaintiff's claim moot and ably explains why this issue merits a grant of

ARGUMENT

I. PERMITTING PUTATIVE CLASS ACTIONS TO PROCEED WITHOUT AN INTERESTED NAMED PLAINTIFF VIOLATES ARTICLE III AND RULE 23, HARMS PLAINTIFFS, AND INVITES ABUSE AND GAMESMANSHIP

This Court has repeatedly recognized that the more novel and expansive the class action invention, "the greater the likelihood of abuse." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 842 (1999); *see also Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011) (rejecting the Ninth Circuit's "Trial by Formula" as a "novel project" forbidden by the Rules Enabling Act). The Ninth Circuit's most recent invention—permitting putative class actions to continue even when *no named plaintiff has a live controversy*—defies reason and invites precisely the abuse forbidden by Article III, Rule 23, due process, and fundamental principles of legal ethics. It incentivizes putative class counsel to discourage their clients from accepting full settlement offers, thereby potentially placing them on the hook for the defendant's costs if they lose, with no upside if they win. The Court should grant review to hold that federal courts should not play hosts to such gamesmanship.

[Footnote continued from previous page]

certiorari. Pet. for Writ of Cert. 13–21. *Amici* agree and will not repeat Petitioner's arguments here.

A. The Rule Adopted By The Third, Fifth, Ninth, Tenth, And Eleventh Circuits Violates Article III, The Rules Enabling Act, And Due Process

The "Case" or "Controversy" requirement of Article III, Section 2 grants federal courts authority to resolve only "the legal rights of litigants in actual controversies." *Valley Forge Christian Coll.* v. *Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (internal quotation marks omitted). A plaintiff may invoke federal-court jurisdiction only if he possesses a legally cognizable interest, or "personal stake," in the outcome of the action. *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1528 (2013) (internal quotation marks omitted). This personal stake must "be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks omitted). Therefore, when a plaintiff's stake in the suit is extinguished, so too is the court's jurisdiction. *Id.*

The decision below creates a loophole that eviscerates these basic Article III principles for class actions. The Ninth Circuit concluded that putative class actions may continue even though the defendants have offered the only named plaintiff complete relief and no other plaintiff has joined the suit. *See* Pet. App. 5a. That conclusion rests on nothing more than speculation that further discovery and litigation *might* motivate others to join a suit being prosecuted by counsel who no longer represents a client with a personal stake in the outcome of the case. *Id.* at 6a (declining to extend to Rule 23 class actions this Court's holding in *Genesis Healthcare*, 133 S. Ct. at

1532). The Third, Fifth, Tenth, and Eleventh Circuits, like the Ninth, permit class actions even where the named plaintiff's individual claim has become moot. Pet. for Writ of Cert. 21–22.

The rule adopted by these circuits runs roughshod over Article III, which prohibits the continuation of litigation based solely on speculation that the attorney will be able to locate a new plaintiff, not presently before the court, who might have a live dispute with the defendant. *See Genesis Healthcare*, 133 S. Ct. at 1528 ("If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, *the action can no longer proceed and must be dismissed.*") (emphasis added) (internal quotation marks omitted). Federal courts may resolve only "present case[s] or controvers[ies]," *City of L.A.* v. *Lyons*, 461 U.S. 95, 102 (1983), that "affect the rights of litigants *in the case before them*," *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975) (emphasis added). Put simply, "[f]ederal jurisdiction cannot be based on contingent future events." *Standard Fire Ins. Co.* v. *Knowles*, 133 S. Ct. 1345, 1349 (2013).

The same rule *must* apply in the class action context. "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997); *see also Carrera* v. *Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) (holding that "[a] defendant in a class action has a due process right to raise individual challenges and defenses"); *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) (same). Thus,

cases presenting no live controversy cannot continue in federal court simply because the complaint contains class allegations—particularly because the absent putative class members are not parties "'to the class-action litigation *before the class is certified.*'" *Standard Fire*, 133 S. Ct. at 1349 (citation omitted); *see also Smith* v. *Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011) (holding that unnamed putative class members "are not parties to the suit" before certification).

Rule 23 is not an end-run around Article III—a bedrock constitutional requirement that must be satisfied "at all stages" of any federal litigation, class actions or otherwise. *Preiser*, 422 U.S. at 401 (internal quotation marks omitted). And allowing cases to continue solely on behalf of absent, unnamed persons would yield precisely the advisory opinions the case or controversy requirement was intended to avoid. It would also turn the rules governing class actions on their head, effectively *exempting* them from Article III's stringent requirements, even though class actions are the "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 131 S. Ct. at 2550; *see also Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (Rule 23 "imposes stringent requirements for certification that in practice exclude most claims"). The potential for abuse under such a regime abounds and warrants this Court's intervention.

B. Permitting Class Actions To Proceed Without A Single "Interested" Named Plaintiff Undermines Rule 23's Procedural Safeguards And Harms Plaintiffs

Rule 23 "provide[s] 'structural assurance of fair and adequate representation'" for named plaintiffs and absent class members, *Ortiz*, 527 U.S. at 856, protections that grow more vital as class-action practice becomes more "adventuresome," *Amchem*, 521 U.S. at 617.

To that end, the class representative must "be part of the class and 'possess the *same interest* and suffer the same injury' as the class members." *Amchem*, 521 U.S. at 625–26 (emphasis added) (quoting *E. Tex. Motor Freight Sys., Inc.* v. *Rodriguez*, 431 U.S. 395, 403 (1977); *see also Dukes*, 131 S. Ct. at 2551 ("Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'") (citation omitted). "The adequacy-of-representation requirement [and the] commonality and typicality criteria" serve as critical "guideposts" for determining whether the named plaintiff's claim and the class claims are "so interrelated that the interests of the class members will be fairly and adequately protected." *Amchem*, 521 U.S. at 626 n.20 (quoting *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 157 n.13 (1982)).

Where, as here, the named plaintiff's claims have been mooted by a full offer of settlement, he necessarily lacks the "same interest" as the absent putative class members who have not received such an offer. Whatever has motivated the lead plaintiff to spurn a "generous immediate payment" undoubtedly

"tugs against the interest" of the class he ostensibly represents. *Amchem*, 521 U.S. at 626. A named plaintiff with such misaligned interests is both an atypical and inadequate class representative as a matter of law. *Id.*

Rule 23 also requires class counsel to adequately represent their clients' interests. Fed. R. Civ. P. 23(a)(4). The touchstone of adequate representation is the alignment of counsel's and the client's interests. *Falcon*, 457 U.S. at 157 n.13. Yet the decision below creates "perverse incentives," *Dukes*, 131 S. Ct. at 2559, for lawyers to discourage their clients from accepting full settlement offers, even though the client will almost certainly recover less at the conclusion of the litigation *and* may even have to pay all parties' costs under Rule 68(d), with no potential for gain but his lawyer's. *Cf. AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1753 (2011) (noting that plaintiffs would have been "better off" accepting an arbitration offer "than they would have been as participants in a class action") (emphasis added). Thus, the decision below pits the client's interests against those of his counsel at this critical juncture.

Worse, the Ninth Circuit's ruling permits lawyers to fully control class litigation without ever being accountable to a client with a personal interest in the lawsuit. It is a foundational principle of legal ethics that the attorney should abide by the *client's* preferences and litigation goals. *See* Model Rules of Prof'l Conduct R. 1.2(a) (2000) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . ."). The rule established by the Third, Fifth, Ninth, Tenth, and Eleventh Circuits turns this well-established model upside down, with troubling and uncertain consequences.

Class litigation is *already* excessively lawyer-driven and "dysfunctional," because often "the principals [i.e., the plaintiffs] cannot effectively monitor their agent [i.e., their lawyer]." John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 371 (2000). Lawyers freely "ignore the preferences of individual class members" and "define the goals of the litigation differently than they otherwise would [in the non-class action context]." *Id.* at 379.[3] And that is when class counsel actually have an interested client to whom they theoretically owe fiduciary duties; one can only imagine the results in a system that permits lawyers lacking clients with a personal stake in the case's outcome to maintain putative class actions. This lack of accountability is even more acute in the context of *putative* class actions, where no Rule 23 inquiry has taken place to examine the adequacy of class counsel and to formal-

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[3] *See also, e.g.*, *Pearson* v. *NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (rejecting class settlement, and noting the "incentive of class counsel, in complicity with the defendant's counsel, to sell out the class," due in part to the fact that "[c]lass counsel rarely have clients to whom they are responsive"); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717–18 (6th Cir. 2013) (rejecting class certification under the adequacy prong and observing that in class actions, "unlike in virtually every other kind of case," the court "cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class"); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 163 (2003) (recognizing the general tendency of class counsel to "embrace a settlement inadequate for all, many, or some class members in exchange for the prospect of obtaining a fee award").

ly establish the duties owed to the absent class members.

The decision below also invites gamesmanship by rewarding lawyers who successfully dissuade their clients from accepting full offers of judgment.

This Court has repeatedly rejected gamesmanship by class counsel who are more concerned with their fees than with their clients' recovery. In *Standard Fire*, 133 S. Ct. 1345, this Court considered a common tactic by lawyers to "stipulate away" putative class claims above $5 million in order to evade federal jurisdiction under the Class Action Fairness Act of 2005. The Court unanimously rejected that gambit, holding that named plaintiffs and their lawyers could not bind absent class members with such self-serving stipulations.

In *Dukes*, 131 S. Ct. 2541, the Court likewise rejected an interpretation of Rule 23(b)(2) that would permit class certification when a request for injunctive and declaratory relief "predominates" over a request for monetary relief, because such an interpretation "creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief." *Id.* at 2559. That concern was not merely theoretical, as the *Dukes* plaintiffs had declined to include claims for compensatory damages in their complaint—claims that absent class members might be collaterally estopped from ever bringing—in order to minimize their monetary claims and increase their chances of Rule 23(b)(2) certification. "That possibility," this Court unanimously held, "underscores the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives." *Id.* (emphasis in original).

These tactics all served to benefit class counsel at the expense of their clients. The decision below incentivizes similarly dangerous conduct. Clients who are pressured or manipulated into rejecting full settlement offers are not just sacrificing significant and immediate monetary relief—they also may be assuming, perhaps unknowingly, the risk of liability for Rule 68 costs at the conclusion of the litigation. No client should be put in such a position simply because her lawyer wishes to pursue a class action for a potentially bigger payday.

II. Settlements Benefit All Parties And The Judicial System

The approach of the Third, Fifth, Ninth, Tenth, and Eleventh Circuits also undermines the judicial policy in favor of settlement before trial. *See McDermott, Inc.* v. *AmClyde*, 511 U.S. 202, 211–15 (1994). Settlement "'eases crowded court dockets and results in savings to the litigants and the judicial system,'" and thus, in appropriate cases, should "'be facilitated at as early a stage of the litigation as possible.'" *Bell Atl. Corp.* v. *Bolger*, 2 F.3d 1304, 1314 n.16 (3d Cir. 1993) (quoting Fed. R. Civ. P. 16(c) & advisory committee's note (1983)); *see also Marek* v. *Chesny*, 473 U.S. 1, 5–6 (1985) (the clear "objective" of Rule 68 "is to encourage settlements").

Defendants often make full settlement offers because they believe that fully compensating the plaintiff will resolve the litigation. But if the plaintiff purports to represent a class, and the putative class claims remain alive despite a full settlement with the putative representative, defendants have little incentive to make such offers, even if they would serve everyone's interest. The rule adopted by the

Ninth Circuit forces defendants to litigate every putative class action all the way through certification, even where the claims are meritless. Such a result wastes judicial resources, generates excessive litigation costs, and prevents named plaintiffs from timely receiving any compensation for their alleged injury, all the while placing them at risk for substantial costs.

The decision below is especially pernicious in cases like this, where Congress's remedial scheme contemplates individual actions and settlements. The TCPA, which prohibits certain unauthorized phone calls, faxes, and text messages, permits plaintiffs to recover up to $500 per negligent violation and up to $1,500 per knowing and/or willful violation, *plus* attorneys' fees—penalties that far outweigh the actual harm or nuisance suffered by a person on the wrong end of an errant marketing call or text message. *See* 47 U.S.C. § 227(b)(3); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1878 (2006) (explaining that the aggregation of "statutory damages that have been decoupled from claimants' actual losses" causes "troubling" and "glaring" class settlement pressure). Congress selected these amounts not to approximate a plaintiff's actual harm, but instead to "encourag[e] enforcement by *individual citizens*." *S. 1462, The Automated Telephone Consumer Protection Act of 1991; S. 1410, The Telephone Advertising Consumer Protection Act; and S. 857, Equal Billing for Long Distance Charges: Hearing Before the S. Subcomm. on Communications of the S. Comm. of Commerce, Science and Transportation*, 102d Cong. 42 (1991)

(statement of Michael Jacobson, Cofounder, Ctr. for the Study of Commercialism) (emphasis added).[4] The amounts are also sufficiently high "to deter violations by telemarketers," even if only a small percentage of affected persons choose to take action. *Id.*

Class actions distort and disturb this remedial scheme. Nothing in the legislative history of the TCPA suggests that Congress intended, or even contemplated, that telemarketing companies would face hundreds of millions or even billions of dollars of potentially ruinous liability for sending a single, mass text message, as Petitioner did here. But that is exactly the risk that exists where class actions exponentially multiply statutory damages claims. *See* Nagareda, *supra*, 106 Colum. L. Rev. at 1881 ("[C]lass settlement pressure is most troubling when aggregation would not merely enable the enforcement of cost-prohibitive claims, but in addition, would distort the underlying remedial scheme."); Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 115 (2009) ("Aggregating statutory damages claims warps the purpose of both statutory damages and class actions.").

Congress did not envision this type of civil enforcement. Instead, it contemplated that, in addition to enforcement by state attorneys general, *see* 47 U.S.C. § 227(g), individuals would sue in "[s]mall

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[4] *See also Concepcion*, 131 S. Ct. at 1753 (rejecting the notion "that class proceedings are necessary to prosecute small-dollar claims" when a plaintiff's arbitration agreement provides that AT&T will pay claimants a minimum of $7,500 if they obtain an award greater than AT&T's last settlement offer).

claims court or a similar court," and that the resulting "amount of damages" in *that* type of litigation is designed "to be fair to both the consumer and the telemarketer." 137 Cong. Rec. S16205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings). Defendants that make full settlement offers thus behave in accordance with the incentives Congress established; any argument that such offers frustrate the TCPA's remedial scheme is baseless.

Finally, the Ninth Circuit's concern that defendants could pretermit class actions by "pick[ing] off" named plaintiffs is exactly backward. Pet. App. 6a (internal quotation marks omitted). So-called "picking off" the class representative by making a full offer of settlement is unlikely to be an effective long-term strategy. Savvy attorneys with class action complaints in hand should have little difficulty recruiting new putative class representatives and refiling a slightly modified complaint once their original client has received the full value of his claims. The defendant must then decide whether to defend itself or to settle with these second-generation class representatives by making another complete offer of relief.

A defendant that continues to offer 100 percent of the amount claimed to every successive would-be class representative is likely to invite a feeding frenzy of litigation. Eventually, a defendant confronted with so many claims may conclude that it would *benefit* from class certification so that it can attempt to settle all of the claims against it for something less than 100 cents on the dollar. From the defendant's financial perspective, this outcome is far more ra-

tional than "picking off" individual plaintiffs one by one.

A defense strategy of resolving litigation through full settlement offers is therefore best suited for cases where putative class counsel cannot find a significant number of plaintiffs willing to step forward for a guaranteed full-offer settlement. And those are precisely the class actions that federal courts should not bend the rules to save.

CONCLUSION

For the reasons stated above and in Petitioner's brief, the writ of certiorari should be granted and the judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 14-857

In the Supreme Court of the United States

CAMPBELL-EWALD COMPANY,
Petitioner,
v.
JOSE GOMEZ,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 16, 2015
CERTIORARI GRANTED MAY 18, 2015

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[1] "C.A.E.R. ___" refers to the Excerpts of Record filed in the United States Court of Appeals for the Ninth Circuit. "C.A.S.E.R. ___" refers to the Supplemental Excerpts of Record filed in that same court. Documents which were filed under seal below have, with the consent of the parties, been reproduced publicly.

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Campbell-Ewald's Navy 2006 Wireless/Mobile Tactical Media Recommendations, dated 3/17/06: Exhibit I to Declaration of Evan M. Meyers in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment (C.D. Cal. Mar. 5, 2012) (excerpts) (C.A.E.R. 381-94) JA-176

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ITEMS PREVIOUSLY REPRODUCED

In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the Petition for a Writ of Certiorari (January 16, 2015)

Opinion of the United States Court of Appeals for the Ninth Circuit, *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014).....1a

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Settlement Offer, *Gomez v. Campbell-Ewald Co.*, No. CV 10-2007 DMG (CWx), dated Jan. 5, 2011 (C.D. Cal. Mar. 11, 2011), ECF No. 45-8 (with enclosure) 57a

Order of the United States Court of Appeals for the Ninth Circuit for Stay of the Issuance of the Mandate, *Gomez v. Campbell-Ewald Co.*, No. 13-55486 (9th Cir. Oct. 24, 2014) 62a

RELEVANT DOCKET ENTRIES

U.S. Court of Appeals for the Ninth Circuit
Case No. 13-55486

Date Filed	#	Docket Text
		* * *
06/24/2013	8	Filed (ECF) Appellee Campbell-Ewald Company Motion to dismiss for lack of jurisdiction. Date of service: 06/24/2013. [8680038] (LAW) [Entered: 06/24/2013 06:42 PM]
		* * *
08/02/2013	13	Filed (ECF) Appellant Jose Gomez response opposing motion (,motion to dismiss for lack of jurisdiction). Date of service: 08/02/2013. [8728897] (MJM) [Entered: 08/02/2013 03:05 PM]
		* * *
08/09/2013	16	Filed (ECF) Appellee Campbell-Ewald Company reply to response (,motion to dismiss for lack of jurisdiction). Date of service: 08/09/2013. [8738337] (LAW) [Entered: 08/09/2013 04:16 PM]
08/20/2013	17	Filed order (Appellate Commissioner):Appellee's motion to dismiss this appeal for lack of

		jurisdiction is denied without prejudice to renewing the arguments in the answering brief. See Nat'l Indus. v. Republic Nat'l Life Ins. Co., 677 F.2d 1258, 1262 (9th Cir. 1982) (stating that merits panel may consider appellate jurisdiction despite earlier denial of motion to dismiss). The opening brief and excerpts of record are due September 30, 2013; the answering brief is due October 30, 2013; and the optional reply brief is due within 14 days after service of the answering brief.. (MOATT) [8748930] (KKW) [Entered: 08/20/2013 09:13 AM]
		* * *
11/15/2013	20	Submitted (ECF) Opening Brief and excerpts of record for review. Submitted by Appellant Jose Gomez. Date of service: 11/15/2013. [8865258] (EMM) [Entered: 11/15/2013 07:36 PM]
		* * *
01/15/2014	29	Submitted (ECF) Answering Brief for review. Submitted by Appellee Campbell-Ewald Company. Date of service: 01/15/2014. [8940476] (LAW) [Entered: 01/15/2014 04:48 PM]

01/15/2014	30	Filed (ECF) Appellee Campbell-Ewald Company petition for rehearing en banc (from 08/20/2013 opinion). Date of service: 01/15/2014. [8940546] (LAW) [Entered: 01/15/2014 05:54 PM]
		* * *
02/28/2014	39	Submitted (ECF) Reply Brief for review. Submitted by Appellant Jose Gomez. Date of service: 02/28/2014. [8997634] (EMM) [Entered: 02/28/2014 01:32 PM]
03/03/2014	40	No active judge has requested a vote to hear this case initially en banc within the time allowed by General Order 5.2a. The request is therefore denied. [8998627] (HH) [Entered: 03/03/2014 09:35 AM]
		* * *
09/19/2014	49	FILED OPINION (FORTUNATO P. BENAVIDES, KIM MCLANE WARDLAW and RICHARD R. CLIFTON) VACATED and REMANDED. The costs shall be taxed against the Defendant-Appellee. Judge: FPB Authoring, FILED AND ENTERED JUDGMENT. [9245863] (RP) [Entered: 09/19/2014 07:06 AM]

10/09/2014	50	Filed (ECF) Appellee Campbell-Ewald Company Motion to stay the mandate. Date of service: 10/09/2014. [9272415] (CMR) [Entered: 10/09/2014 06:41 PM]

* * *

10/23/2014	53	Filed (ECF) Appellant Jose Gomez response opposing motion (,motion to stay the mandate). Date of service: 10/23/2014. [9288776] (EMM) [Entered: 10/23/2014 10:58 PM]
10/24/2014	54	Filed order (FORTUNATO P. BENAVIDES, KIM MCLANE WARDLAW and RICHARD R. CLIFTON) Appellee's motion for a stay of the issuance of the mandate pending a petition for writ of certiorari is GRANTED. Fed. R. App. P. 41(b). The mandate shall be stayed for 90 days from the filing date of this order pending the filing of a petition for writ of certiorari in the Supreme Court. If a petition for writ of certiorari is filed, the stay shall continue until final disposition by the Supreme Court. IT IS SO ORDERED. [9289794] (SM) [Entered: 10/24/2014 02:16 PM]

* * *

05/19/2015	57	Received notice from the Supreme Court. Petition for certiorari GRANTED on 05/18/2015. Supreme Court Number 14-857. [9543453] (RR) [Entered: 05/19/2015 07:29 PM]

RELEVANT DOCKET ENTRIES

U.S. District Court
for the Central District of California
Case No. 2:10-cv-02007-DMG-CW

Date Filed	#	Docket Text
03/19/2010	1	COMPLAINT against Defendant Campbell-Ewald Company. Case assigned to Judge Dolly M. Gee for all further proceedings. Discovery referred to Magistrate Judge Carla Woehrle.(Filing fee $ 350: PAID) Jury Demanded., filed by plaintiff Jose Gomez.(ghap) (ds). (Entered: 03/22/2010)
		* * *
06/02/2010	9	STIPULATION for Extension of Time to File Motion For Class Certification filed by plaintiff Jose Gomez. (Attachments: # 1 Declaration Of Sean Reis In Support of Stipulation To Move Date For Filing Motion For Class Certification, # 2 Proposed Order Moving Date For Filing Motion For Class Certification)(Reis, Sean) (Entered: 06/02/2010)
06/03/2010	10	ORDER MOVING DATE FOR FILING MOTION FOR CLASS CERTIFICATION (L.R. 23-3) by Judge Dolly M. Gee 9 : 1.

		Stipulation of the Parties is approved; and 2. Deadline for Plaintiff to file his motion for class certification is extended until after all Parties have answered and presented a proposed discovery schedule to the Court setting forth the deadlines and requirements associated with the parties Rule 26(f) conference and report. (kpa) (Entered: 06/04/2010)
		* * *
11/19/2010	23	ANSWER to Complaint (Discovery), Complaint (Discovery) 1 filed by Defendant Campbell-Ewald Company. (Wytsma, Laura) (Entered: 11/19/2010)
		* * *
01/05/2011	31	NOTICE of Offer of Judgment filed by Defendant Campbell-Ewald Company. , Pursuant to Federal Rule of Civil Procedure 68 (Attachments: # 1 Exhibit 1) (Wytsma, Laura) (Entered: 01/05/2011)
01/19/2011	32	NOTICE OF MOTION AND MOTION to Strike And Quash Defendant's Improper Rule 68 Offer Of Judgment Notice of Offer of Judgment 31 filed by plaintiff Jose Gomez. Motion set for hearing

on 3/21/2011 at 09:30 AM before Judge Dolly M. Gee. (Attachments: # 1 Memorandum of Points and Authorities, # 2 Exhibit 1 Coversheet, # 3 Proposed Order)(Reis, Sean) (Entered: 01/19/2011)

01/19/2011	33	NOTICE OF MOTION AND MOTION to Certify Class filed by plaintiff Jose Gomez. Motion set for hearing on 3/21/2011 at 09:30 AM before Judge Dolly M. Gee. (Attachments: # 1 Memorandum Of Points And Authorities, # 2 Declaration Of Michael J. McMorrow, # 3 Proposed Order)(Reis, Sean) (Entered: 01/19/2011)

* * *

03/11/2011	44	OPPOSITION re: MOTION to Certify Class 33 filed by Defendant Campbell- Ewald Company. (Wytsma, Laura) (Entered: 03/11/2011)

* * *

03/11/2011	47	NOTICE OF MOTION AND MOTION to Dismiss Case filed by Defendant Campbell-Ewald Company. Motion set for hearing on 4/8/2011 at 02:30 PM before Judge Dolly M. Gee. (Attachments: # 1 Proposed Order)(Wytsma, Laura)

(Entered: 03/11/2011)

03/11/2011	48	OPPOSITION re: MOTION to Strike And Quash Defendant's Improper Rule 68 Offer Of Judgment Notice of Offer of Judgment 31 MOTION to Strike And Quash Defendant's Improper Rule 68 Offer Of Judgment Notice of Offer of Judgment 31 32 filed by Defendant Campbell-Ewald Company. (Wytsma, Laura) (Entered: 03/11/2011)

* * *

03/25/2011	58	REPLY In Support of Motion to Strike and Quash, and Response in Opposition to Motion to Dismiss MOTION to Dismiss Case 47 , MOTION to Strike And Quash Defendant's Improper Rule 68 Offer Of Judgment Notice of Offer of Judgment 31 MOTION to Strike And Quash Defendant's Improper Rule 68 Offer Of Judgment Notice of Offer of Judgment 31 32 filed by Plaintiff Jose Gomez. (Attachments: # 1 Exhibit A, # 2 Declaration of Michael J. McMorrow) (McMorrow, Michael) (Entered: 03/25/2011)
03/25/2011	59	REPLY in Support of Motion for Class Certification MOTION to Certify Class 33 filed by Plaintiff Jose Gomez. (Attachments: # 1

Declaration of Daniel Rostnthal, # 2 Declaration of Jose Gomez, # 3 Exhibit A to Declaration of Jose Gomez, # 4 Declaration of Michael J. McMorrow, # 5 Exhibit A to Declaration of Michael J. McMorrow, # 6 Exhibit B to Declaration of Michael J. McMorrow, # 7 Exhibit C to Declaration of Michael J. McMorrow, # 8 Exhibit D to Declaraiton of Michael J. McMorrow, # 9 Exhibit E to Declaration of Michael J. McMorrow, # 10 Exhibit F to Declaration of Michael J. McMorrow, # 11 Exhibit G to Declaration of Michael J. McMorrow)(McMorrow, Michael) (Entered: 03/25/2011)

* * *

04/01/2011 63 REPLY IN SUPPORT MOTION to Dismiss Case 47 filed by Defendant Campbell-Ewald Company. (Wytsma, Laura) (Entered: 04/01/2011)

* * *

04/08/2011 67 ORDER RE: (1) PLAINTIFF'S MOTION TO STRIKE; (2) PLAINTIFF'S MOTION FOR CLASS CERTIFICATION; AND (3) DEFENDANT'S MOTION TO DISMISS by Judge Dolly M. Gee:

		Defendant's Motion to Dismiss/Motion for Summary Judgment 47 is DENIED. Plaintiff's Motion to Strike and Quash Defendant's Rule 68 Offer 31 32 is GRANTED. The Court defers its ruling on Plaintiff's Motion for Class Certification 33 until after the parties have conducted class discovery: (a) The parties shall meet and confer regarding a schedule for class discovery and shall file an Amended Joint Rule 26(f) Report regarding their proposed schedule by 4/22/2011; (b) The parties shall meet and confer regarding a new schedule for supplemental briefing, if any, on Plaintiff's Motion for Class Certification and shall include their proposed schedule in their Amended Joint Rule 26(f) Report; (c) The parties shall appear for a telephonic Status Conference on 5/2/2011 at 11:00 AM. (gk) (Entered: 04/11/2011)
		* * *
10/18/2011	115	NOTICE OF MOTION AND MOTION for Summary Judgment filed by Defendant Campbell-Ewald Company. Motion set for hearing on 12/9/2011 at 03:00 PM before Judge Dolly M. Gee. (Attachments: # 1 Proposed Order)

(Reilly, Christine) (Entered: 10/18/2011)

* * *

10/25/2011 123 OPPOSITION to MOTION for Summary Judgment 115 [PLAINTIFFS RESPONSE TO DEFENDANTS REQUEST FOR MODIFIED BRIEFING SCHEDULE] filed by Plaintiff Jose Gomez. (Reis, Sean) (Entered: 10/25/2011)

* * *

11/07/2011 131 NOTICE OF MOTION AND MOTION for Judgment on the Pleadings as to Pursuant to Rule 12(c) of the FRCP filed by defendant Campbell-Ewald Company. Motion set for hearing on 12/5/2011 at 09:30 AM before Judge Dolly M. Gee. (Attachments: # 1 Proposed Order)(Reilly, Christine) (Entered: 11/07/2011)

* * *

11/14/2011 142 MEMORANDUM in Opposition to MOTION for Judgment on the Pleadings as to Pursuant to Rule 12(c) of the FRCP MOTION for Judgment on the Pleadings as to Pursuant to Rule 12(c) of the FRCP 131 filed by Plaintiff Jose Gomez. (Attachments: # 1 Declaration Of Evan M. Meyers, # 2 Exhibit A To

		Declaration of Evan M. Meyers)(Reis, Sean) (Entered: 11/14/2011)
		* * *
11/21/2011	145	REPLY in support of MOTION for Judgment on the Pleadings as to Pursuant to Rule 12(c) of the FRCP MOTION for Judgment on the Pleadings as to Pursuant to Rule 12(c) of the FRCP 131 filed by Defendant Campbell-Ewald Company. (Reilly, Christine) (Entered: 11/21/2011)
		* * *
03/05/2012	174	MEMORANDUM in Opposition to MOTION for Summary Judgment 115 filed by Plaintiff Jose Gomez. (Attachments: # 1 Declaration Of Evan Meyers, # 2 Exhibit A to Meyers Declaration, # 3 Exhibit C to Meyers Declaration, # 4 Exhibit F to Meyers Declaration, # 5 Exhibit P to Meyers Declaration, # 6 Exhibit Q to Meyers Declaration, # 7 Exhibit S to Meyers Declaration, # 8 Supplement Separate Statement of Genuine Disputes Of Material Fact And Additional Statement Of Undisputed Material Fact, # 9 Proposed Order Denying Defendant's Motion for Summary Judgment)(Reis, Sean) (Entered:

		03/05/2012)
		* * *
03/19/2012	200	REPLY in support MOTION for Summary Judgment 115 filed by Defendant Campbell-Ewald Company. (Reilly, Christine) (Entered: 03/19/2012)
		* * *
03/20/2012	210	SEALED DOCUMENT- REPLY in Support of Defendant Campell-Ewald Company's MOTION for Judgment.(mat) (Entered: 03/29/2012)
		* * *
02/22/2013	231	ORDER RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR JUDGMENT ON THE PLEADINGS by Judge Dolly M. Gee: Defendant Campbell-Ewald Company's Motion for Summary Judgment 115 is GRANTED and its Motion for Judgment on the Pleadings 131 is DENIED. (gk) (Entered: 02/22/2013)
02/22/2013	232	JUDGMENT by Judge Dolly M. Gee: IT IS HEREBY ORDERED, ADJUDGED, and DECREED that judgment is entered in favor of Defendant Campbell-Ewald Company and against Plaintiff Jose Gomez, who shall take nothing.

		(MD JS-6, Case Terminated). (gk) (Entered: 02/22/2013)
		* * *
03/22/2013	238	NOTICE OF APPEAL to the 9th CCA filed by plaintiff/appellant Jose Gomez. Appeal of Order on Motion for Summary Judgment, Order on Motion for Judgment on the Pleadings,, 231 , Judgment 232 (Appeal fee of $455 paid.) (Attachments: # 1 Judgment, # 2 Order Granting Summary Judgment) (McMorrow, Michael) (Entered: 03/22/2013)
		* * *

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ATTORNEYS FOR PLAINTIFFS

FILED
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CLERK US DISTRICT COURT
CENTRAL DISTRICT OF CALIF
LOS ANGELES
BY: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOSE GOMEZ, individually and on behalf of a class of similarly situated individuals,	)	Case No. CV10 2007 DMG (CWx)
Plaintiff,	)	**CLASS ACTION COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF**
v.	)	
CAMPBELL-EWALD COMPANY, a Delaware corporation,	)	1) Violation of 47 U.S.C. § 227
Defendant.	)	DEMAND FOR JURY TRIAL

CLASS ACTION COMPLAINT

Plaintiff Jose Gomez brings this class action complaint against Defendant Campbell-Ewald

Company ("Campbell-Ewald") to stop Defendant's practice of making unsolicited text message calls to cellular telephones, and to obtain redress for all persons injured by its conduct. This court has jurisdiction over this class action pursuant to 28 U.S.C. § 1332 (d). Plaintiff, for his class action complaint, alleges as follows upon personal knowledge as to himself and his own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by his attorneys.

NATURE OF THE CASE

1. Defendant Campbell-Ewald, a self-described "top 25 American advertising agency," designs and implements advertising campaigns nationwide for clients such as General Motors, Kaiser Permanente and Alltel Wireless.

During one such campaign for the U.S. Navy, Defendant Campbell-Ewald engaged in an especially pernicious form of marketing: the unauthorized transmission of advertisements in the form of "text message" calls to the cellular telephones of consumers throughout the nation.

2. By effectuating these unauthorized text message calls (hereinafter, "wireless spam"), Defendant has caused consumers actual harm, not only because consumers were subjected to the aggravation that necessarily accompanies wireless spam, but also because consumers frequently have to pay their cell phone service providers for the receipt of such wireless spam.

3. In order to redress these injuries, Plaintiff, on behalf of himself and a nationwide class of similarly situated individuals, brings suit under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* ("47

U.S.C. § 227"), which prohibits unsolicited voice and text calls to cell phones.

4. On behalf of the class, Plaintiff seeks an injunction requiring Defendant to cease all wireless spam activities, and an award of statutory damages to the class members, together with costs and reasonable attorneys' fees.

PARTIES

5. Plaintiff is a resident of Illinois.

6. Defendant Campbell-Ewald is a Delaware corporation who at all relevant times maintained its headquarters and principal place of business in Michigan. A subsidiary of the Interpublic Group of Companies, Inc., Campbell-Ewald is a global advertising agency that provides marketing services to its clients throughout the United States, including this district.

JURISDICTION & VENUE

7. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(d), because (a) at least one member of the putative class is a citizen of a state different from Defendant, (b) the amount in controversy exceeds $5,000,000, exclusive of interest and costs, and (c) none of the exceptions under that subsection apply to this action.

8. This Court has personal jurisdiction over the Defendant because the acts alleged herein originated in this District and because the Defendant maintains offices in this District.

9. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a) because Defendant resides in this District and because a substantial part of the events giving rise to the claim occurred in this District, as the

Defendant's agent that transmitted the text message calls also resides in this District.

COMMON ALLEGATIONS OF FACT

10. In recent years, marketers who often have felt stymied by federal laws limiting solicitation by telephone, facsimile machine, and e-mail have increasingly looked to alternative technologies through which to send bulk solicitations cheaply.

11. One of the newest types of such bulk marketing is to advertise through Short Message Services. The term "Short Message Service" or "SMS" is a messaging system that allows cellular telephone subscribers to use their cellular telephones to send and receive short text messages, usually limited to 160 characters.

12. An "SMS message" is a text message call directed to a wireless device through the use of the telephone number assigned to the device. When an SMS message call is successfully made, the recipient's cell phone rings, alerting him or her that a call is being received. As cellular telephones are inherently mobile and are frequently carried on their owner's person, calls to cellular telephones, including SMS messages, may be instantly received by the called party virtually anywhere worldwide.

13. Unlike more conventional advertisements, SMS calls, and particularly wireless spam, can actually cost their recipients money, because cell phone users must frequently pay their respective wireless service providers either for each text message call they receive or incur an usage allocation deduction to their text plan, regardless of whether or not the message is authorized.

14. Over the course of an extended period beginning in at least 2006, Defendant directed the mass

transmission of wireless spam to the cell phones of consumers nationwide to advertise on behalf of the U.S. Navy.

15. For instance, on or about May 11, 2006, Plaintiffs cell phone rang, indicating that a text call was being received.

16. The "from" field of such transmission was identified cryptically as "43704," a format which Plaintiff later learned was an abbreviated telephone number known as an SMS short code licensed and operated by Defendant's agent. The body of such text message read:

DESTINED FOR SOMETHING BIG? DO IT IN THE NAVY. GET A CAREER. AN EDUCATION. AND A CHANCE TO SERVE A GREATER CAUSE. FOR A FREE NAVY VIDEO CALL [redacted]

17. Defendant's and its agent's use of an SMS short code enabled Defendant's mass transmission of wireless spam to a list of cellular telephone numbers.

18. Indeed, over the next several months, Plaintiff received additional spam text message advertisements from the same short code, in knowing violation of Plaintiff's privacy.

19. At no time did Plaintiff consent to the receipt of such text message calls from Defendant.

CLASS ACTION ALLEGATIONS

20. Plaintiff brings this action pursuant to Federal Rule of Civil Procedure (b)(2) and Rule 23(b)(3) on behalf of himself and a class (the "Class") defined as follows: all persons in the United States and its Territories who received one or more unauthorized text message advertisements from Defendant.

21. In order to make its *en masse* transmissions of text message advertisements economical, Defendant and its agents used one or more short codes to transmit the text messages to thousands of consumers' cellular telephone numbers. As such, the Class consists of thousands of individuals and other entities, making joinder impractical.

22. Plaintiff will fairly and adequately represent and protect the interests of the other members of the Class. Plaintiff has retained counsel with substantial experience in prosecuting complex litigation and class actions. Plaintiff and his counsel are committed to vigorously prosecuting this action on behalf of the members of the Class, and have the financial resources to do so. Neither Plaintiff nor his counsel has any interest adverse to those of the other members of the Class.

23. Absent a class action, most members of the Class would find the cost of litigating their claims to be prohibitive, and will have no effective remedy. The class treatment of common questions of law and fact is also superior to multiple individual actions or piecemeal litigation in that it conserves the resources of the courts and the litigants, and promotes consistency and efficiency of adjudication.

24. Defendant has acted and failed to act on grounds generally applicable to the Plaintiff and the other members of the Class in transmitting the wireless spam at issue, requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the members of the Class.

25. The factual and legal bases of Defendant's liability to Plaintiff and to the other members of the Class are the same, resulting in injury to the Plaintiff

and to all of the other members of the Class as a result of the transmission of the wireless spam alleged herein. Plaintiff and the other Class members have all suffered harm and damages as a result of Defendant's unlawful and wrongful conduct as a result of the transmission of the wireless spam.

26. There are many questions of law and fact common to the claims of Plaintiff and the other members of the Class, and those questions predominate over any questions that may affect individual members of the Class. Common questions for the Class include but are not limited to the following:

(a) Does the wireless spam Defendant distributed violate 47 U.S.C. § 227?

(b) Are the Class's members entitled to treble damages based on the willfulness of Defendant's conduct?

FIRST CLASS ACTION

(Violation of 47 U.S.C. § 227: On behalf of the Class)

27. Plaintiff incorporates by reference the foregoing allegations as if fully set forth herein.

28. Defendant made unsolicited commercial text calls, including the message transcribed above, to the wireless telephone numbers of the Class. Each such text message call was made using equipment that had the capacity to store or produce telephone numbers using a random or sequential number generator, and to dial such numbers. By using such equipment, Defendant was able to effectively send text messages to thousands of consumers' wireless telephone numbers without human intervention.

29. These text calls were made *en masse* and without the prior express consent of the Plaintiff and the other members of the Class to receive such wireless spam.

30. Defendant has, therefore, violated 47 U.S.C. § 227(b)(l)(A)(iii). As a result of Defendant's conduct, the members of the class suffered damages by, *inter alia*, having to pay their respective wireless carriers for the text messages where applicable, and, under section 227(b)(3)(B), are each entitled to, *inter alia*, a minimum of $500.00 in damages for each violation of such act.

31. Because Defendant had knowledge that Plaintiff and the Class did not consent to the receipt of the aforementioned wireless spam, the Court should, pursuant to section 47 U.S.C. § 227(b)(3)(C), treble the amount of statutory damages recoverable by the Plaintiff and the other members of the Class.

WHEREFORE, Plaintiff Jose Gomez, on behalf of himself and the Class, prays for the following relief:

1. An order certifying the Class as defined above;
2. An award of actual and statutory damages;
3. An injunction requiring Defendant to cease all wireless spam activities;
4. An award of reasonable attorneys' fees and costs; and
5. Such further and other relief the Court deems reasonable and just.

JURY DEMAND

Plaintiff requests trial by jury of all claims that can be so tried.

Respectfully submitted,

Dated: March 19, 2010

By: /s/ Sean P. Reis

Sean P. Reis
EDELSON MCGUIRE, LLP
Attorneys for JOSE GOMEZ, individually and on behalf of a class of similarly situated individuals

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE GOMEZ, individually and on behalf of a class of similarly situated individuals, Plaintiff,	)	Case No. 10-cv-2007-DMG (CWx)
v.	)	Honorable Dolly M. Case
CAMPBELL-EWALD COMPANY, a Delaware corporation, Defendant.	)	

VIDEOTAPE DEPOSITION
OF
LEE A. BUCHSCHACHER
January 6, 2012

* * *

[24]

A. Yes, they prepared it.

Q. And you reviewed what they drafted and sent to you?

A. That is correct.

Q. Did you make changes to what they sent to you?

A. Yes, I did.

Q. Do you recall what changes you made from that first draft that they sent you?

A. Just a few minor changes, mainly about my years of service in the government, my position in the organization, and I believe the Admiral at the time, the name of the Admiral.

Q. Anything else you recall that you changed?

A. Not really.

Q. So other than that, you believe that you did not change the declaration that Loeb & Loeb had drafted?

A. No, I did not change it, other than those errors.

Q. Thank you. Do you still have a copy of that first draft that they sent you?

A. No, I do not.

* * *

[27]

* * *

A. That is correct, but I was satisfied with the wording as it appears and as my layman understanding of what word.

Q. What is your layman's understanding of that word?

A. That they act in and for the Navy advertising effort.

Q. They act for the Navy advertising effort.

A. Yes.

Q. Is your understanding of - - is every advertising company that the Navy or the NRC - - strike that.

I want to make clear here. When I refer to the Navy, I'm referring to it in laymen's terms as including the Navy and the NRC. If for any time you believe

that it's necessary to make that distinction, by all means, please let me know.

A. I will.

Q. Okay. Do you understand what the legal [28] definition of the term agent is?

A. I do not.

Q. You're not a lawyer, correct?

A. That's correct.

Q. Did Loeb & Loeb explain to you what they believe the word agent meant in the context of this declaration?

A. No, they did not; however, they did say there were certain terms that will be used that have legal definitions that have implications that are far beyond the understanding of most laymen.

Q. And most lawyers for that matter, but that's a different story.

But other than that sentence, they didn't explain to you what they believed the term agent meant in the context of either this litigation or your Declaration?

A. No, they did not.

Q. Do you know the legal difference between agent and a contractor?

A. No, I do not.

Q. So is it fair to say that when you executed your Declaration, you were not intending to testify that Campbell-Ewald was the Navy's agent as [29] that term is legally defined?

A. I would be at a loss to say yes.

Q. I just want to clarify – and sorry to exhaust this –

A. Sure.

Q. – the total amount of conversations you had with Loeb. It was in July approximately, maybe the summer, which was the initial conversation?

A. The heads-up.

Q. The heads-up?

A. Uh-huh.

Q. You had – the second conversation was the substantive 90 minute conversation with Ms. Reilly?

A. Yes.

Q. And you said there was a third one. What was the third conversation?

A. Well, the third conversation, of course, was the preparation for the testimony.

Q. And when did that take place, that third conversation?

A. Yesterday – no – yes, yesterday, Thursday.

* * *

[36]

Q. What was the position that you held immediately before retirement?

A. My position immediately before retirement was Strategic Planning Officer for the Marketing and Advertising Department; however, that was not the position I was in during the 2006 campaign.

Q. What was the position that you were in during that 2006 campaign?

A. I was Deputy Director of the Marketing and Advertising Plans Division and supervisor of the Program Advertising Managers.

Q. Is the Strategic Marketing Plans Officer – and that's not maybe the precise term – but the position

that you had upon retirement, was that for lack of a better word a level above the position that you held in 2006?

A. I don't think so. I didn't get any more pay.

Q. As of 2011, who did you report to?

A. In 2011?

Q. Yes.

A. I reported to Commander Phillips.

Q. Did anyone report to you?

A. Not at that time.

* * *

[39]

Q. So the NRC puts it together?

A. Yes.

Q. And gives it to in this situation Campbell-Ewald?

A. Right, as the official document of the Commander's guidance for the next year.

Q. And ultimately then you ask Campbell-Ewald to come up with advertising ideas, strategies and campaigns to further the goals that you suggested?

A. Right. We rely on their expertise to figure out which medias and the mix of medias that is most likely – with the money we have available most likely to get the biggest bang for our buck and success.

Q. You also mention Dan Rioux – is it Reo or Rioux?

MR. GAULZETTI: Rioux.

Q. (By Mr. Meyers) Rioux. You mentioned Dan Rioux. Can you tell me who Dan Rioux is?

A. Dan Rioux is a media planner for Campbell-Ewald. I have known him for, I guess, about twelve years, eleven or twelve years, since Campbell-Ewald has been on the account.

* * *

[64]

* * *

Q. Does the Navy authorize Campbell-Ewald employees to directly speak with the potential recruits about joining the Navy?

A. Technically, yes. There are subcontractors who operates our toll free number, have what you call 1-800 U.S.A. Navy.

You say I'm interested in being a pilot, and they say, well, what's your education level, and they will ask them, you know, if they have a college degree or not, how old they are, very rudimentary blueprinting.

So in that regards, they do have contact with individuals, but it's their subcontractor who operates the toll free number.

Q. Does Campbell-Ewald – are you aware of any Campbell-Ewald employees, actual employees who directly speak with potential recruits about whether to join the Navy?

A. No.

* * *

[68]

* * *

Q. So the Navy doesn't say we want you to do TV, internet, direct – that's up to the advertising company

to figure out the best way to maximize the Navy's budget –

A. That's correct?

Q. –in light of the Navy's recruitment goals?

A. Yes. Now, we quite frankly have a few white elephants that we like to feed. For example, we want to be in the Army Navy game every year. And in order to do that, we may have to be in some of the college games so we can be in the Army Navy game.

But other than things like that, we don't say, oh, yeah, we want you to spend all this money in television.

Q. You don't want to be in the game, you want to win the game, right?

A. Navy wants to win the game.

* * *

[80]

* * *

Q. Did Campbell-Ewald make these annual presentations every year since they became the advertising company of record?

A. Yes, they have.

Q. Were you involved in receiving or hearing the presentation every year?

A. Yes, I was.

Q. Did you – did the company that you – the advertising company that you used prior to 2000, BBDO, did they do the same thing, an annual report?

A. No, they did not. It was a different process.

Under BBDO, we told them what they were going to do. We actually told them they were going to do X

amount of dollars in television, X amount of dollars in magazines and this and that and what have you.

Of course, back then our budgets were a lot smaller. So we did what was called an ad plan which we sent to the advertising agency, again, incorporating the similar stuff that we give [81] Campbell-Ewald, in other words, what our recruiting goals are, when we have to meet them, what the difficulties are and the amount of money available, but we also then dictated to them what they were going to do, and they would come back and ask to massage it.

Q. But that process changed when Campbell-Ewald became involved?

A. Yes, it did.

Q. It was a little bit more broader. It was -- as we talked about, it was a broader budget and goals, and then it was deferred to Campbell-Ewald to come up with the solution?

A. First of all, under BBDO, it was a cost plus contract, so that meant what BBDO would give us, we'd say I'd like to have a magazine ad for general enlisted recruiting, and it should have something about high technology and adventure in the Navy.

They would come back and give us a proposal of we need -- you know, we need 40 direct hours and out-of-pocket expense of about $2,000.00 and we'll produce a nice comp for you, comprehensive design.

[82] We would approve that, and then they would actually do the work. When it came time to bill, they would bill 80 hours, and we said, wait a minute, we approved 40 but you billed 80. Well, what can I say, we never really got into this before, and, you know, we're kind of new to this and we really don't know. It's a new subject for us, and they weaseled their way out of it.

So the Admiral was very frustrated, and that's when she decided to end the contract and create a new contract that was a firm fixed price.

Q. And in addition to changing to a firm fixed price contract, you also changed the way that – the deference to the advertising company?

A. Right.

Q. Okay.

A. It was much more of a partnership with Campbell-Ewald.

Q. Were you involved in the discussion of this annual plan after it was presented to you?

A. Yes.

Q. And ultimately was the plan approved?

A. Yes, with modifications. I can't tell you what the modifications were, but there's always some ...

* * *

[84]

* * *

A. Yes, we do. We recruit 17 year olds with parents permission, and we go up to age 34 or 35, somewhere around 34, and we have waivers for medical officers and chaplains. And if we need somebody bad enough, we can waiver it to a point.

Q. But 18 to 24 is the target audience of most of the advertising?

A. Yes. It makes it convenient because we can buy media that will reach 18 to – and that are measured to reach 18 to 24 year olds. It's more difficult if you raise the upper end and more costly, by the way.

Q. When the Navy accepted Campbell-Ewald's proposal for this Wireless/Mobile Marketing campaign in December of 2005, were there any – at the time, were there any further discussions of what that campaign would be other than what's written here?

A. No.

Q. The Navy just liked the idea of contacting people via text message as a campaign?

A. Right.

* * *

[86]

A. I know I reviewed some copy that they wanted to use on the text, and I don't remember if this – launched this in July or – I don't know if it's in here or not, but that would be – I saw an E-Mail that you should have a copy of where I corrected the text.

Q. You know, I actually have that E-Mail. Let's put it in front of you now just to verify that.

A. Okay. I thought that it was all included in here. That's why I'm looking for it in here in this pile.

Oh, yes, here it is. It was April 2006.

Q. April 2006 was the first time you had heard about the 2006 text campaign?

A. No, no, not the campaign. I heard about that when we approved the thing, but we were going to do it, but it wasn't until we got some proposed copy.

Q. And that's what I want to ask you about. After it was approved and agreed that Campbell-Ewald should go forward with some text campaign, when was the next time that you were contacted about what that 2006 text campaign would look like or how it [87] would go forward?

A. Probably the 27th of April here from Daidria Grayson.

Q. Were you personally involved in telling Campbell-Ewald how to go forward with the text campaign?

A. Well, we approved – when you say how, we approved all copy and all images.

Q. Understood. So other than the approval of the copy -- and we'll talk about that E-Mail in a second -- were you involved in the approval or the planning of the actual 2006 Text Message Campaign?

A. Again, approval of the copy.

Q. Other than the approval of the copy –

A. Sure.

Q. That's it?

A. That's it.

Q. Are you aware of anyone at the Navy or the NRC being involved in the approval or planning of the 2006 Text Message Campaign prior to the approval of copy?

A. Maybe Cornell Galloway because it was in the general enlisted area that this text campaign was.

[88] Q. Who would the NRC's – on this 2006 campaign, did the Navy have what I would call a point person who was responsible for working with Campbell-Ewald on that campaign?

A. Well, again, our program advertising manager for the general enlisted program is Cornell Galloway, and he would work a little closer, but I approved the copy after it was staffed at the headquarters. We staff it.

Q. What do you mean by staffing?

A. Well, some copy is very long, very involved, very detailed. We have to make sure that the offer we are making is technically correct, tactically correct; in other words, if you say you'll join the Navy and fly airplanes, it has to be corrected and provided you meet the requirements.

And so we staff it to our recruiting operations people. Sometimes we'll staff it to the JAG if we have a question of legality, but usually we don't. They usually find more problems than not.

But on simple things like this, it was just staffed within the Advertising Department.

* * *

[93]

* * *

Q. And they wrote your understanding is they wrote this recommendation after the December 2005 general plan was approved? This is the specific plan that they came up with?

A. (Witness nods head).

Q. Were you involved in drafting this recommendations document?

A. No, no.

Q. Were you involved personally in giving any input into what would go into this recommendations?

A. No.

Q. Are you aware of anyone with the Navy that was involved in drafting the recommendations?

A. No one from the Navy was involved in drafting this. This is Campbell-Ewald's recommendation to us.

Q. So no one in the Navy was involved in providing input into what would go into these recommendations.

A. No.

* * *

[97]

A. Yeah. They do that a lot in their briefings, and sometimes it's stuff we already know and sometimes it isn't.

Q. And in this case it was something that you had maybe some familiarity with but you didn't know a lot of details about?

A. That's correct.

Q. There were multiple recommendations included in this March 2006 document, is that correct?

A. That's correct.

Q. Did the Navy ultimately approve all of the recommendations that were in here, if you know?

A. Yes, I believe so.

Q. In this document, let's turn to Page 13. It says MindMatics at the top.

A. Yes.

Q. Was your review of this document the first time you were aware of the company MindMatics?

A. Yes.

Q. Was MindMatics the vendor involved in transmitting the 2006 text messages?

A. I don't know. I guess.

Q. Is it fair to say that you were not involved [98] in choosing MindMatics as the vendor?

A. Right. We don't select the vendors.

Q. So no one from the Navy was involved in selecting MindMatics as the vendor then?

A. We have nothing to compare it with.

Q. And is that true for most campaigns above and beyond text messages.

A. Yes.

Q. That Campbell-Ewald is the one who decides the vendor typically?

A. Right, and usually we have some discussions if we have familiarity with it. For example, in the magazines, they will say we want to use Sports Illustrated. Well, we know Sports Illustrated is a very expensive publication and overreaches, and sometimes we might say, well – but we have firsthand knowledge of those. These are vendors we have no knowledge of.

Q. When you don't have knowledge, you typically defer to

A. Defer to the agency.

Q. Okay.

A. That's why we pay them the big bucks as they say.

* * *

[108]

* * *

Q. And are you familiar with which contract that was that governed the big contract as of May 2006?

A. Yes, I'm familiar.

Q. Prior to the break, you mentioned that it was important to the Navy to be on the cutting edge of technology?

A. (Witness nods head).

Q. Is that correct?

A. That's correct.

Q. Did the Navy specifically tell Campbell-Ewald that it wanted to utilize text messaging for advertising?

A. Not that I know of, but it was generally stated by several directors of advertising that we -- that Campbell-Ewald should be looking at the emerging technologies and where appropriate to maximize our effectiveness with their use.

Q. So the Navy stated that they wanted the most effective cutting edge technologies, and Campbell-Ewald came up with the idea of utilizing text messages as part of such a technology?

A. That's correct.

* * *

[110]

* * *

Q. That was Campbell-Ewald's choosing how they wanted to staff the different campaigns.

A. Right.

Q. To go back to the March 2006 recommendations that you have in front of you, you had mentioned that this was the first time that you saw the Text Message Campaign proposal since it was suggested in December 2005, is that correct?

A. That's correct.

Q. Did you also testify that all of these proposals that were included in these recommendations were approved by the Navy?

A. Yes.

Q. Did the – did you or anyone that you were aware of at the Navy make any changes to the actual proposal set forth in the March recommendations?

A. No.

* * *

[112]

* * *

Q. Do you recall receiving this E-mail?

A. Yes, yes, I do.

Q. And this E-Mail was attaching a copy for the MindMatics wireless text blast, is that correct?

A. That's correct.

Q. Turn, please, to the next page, Bates number 366.

A. Okay.

Q. Do you recall if that was the attachment that was included in that E-Mail?

A. Yes, I do.

Q. And the first message says, MindMatics text blast (160 characters), correct?

A. That's correct.

Q. That was Campbell-Ewald's proposed copy for the 2006 text message?

A. Yes, it was.

Q. Was this E-Mail the first time you had seen the proposed copy for the 2006 message?

A. I believe it was.

Q. Are you aware of anyone at the Navy having [113] seen the proposed copy prior to this E-mail?

A. No, I'm not.

Q. Is it your understanding that it was Campbell-Ewald fully responsible for drafting the proposed copy prior to sending it to you?

A. Oh, yes, uh-huh.

Q. And then let's go up on the same page. There's another E-mail dated April 28, 2006. It says from lee.buchschacher@navy.mil to dgrayson.

Have you seen the E-mail before?

A. Yes.

Q. Is that your response to Ms. Grayson?

A. Yes, it is.

Q. And it says, Daidria, The text is approved provided we change the word "prove" to "do" in both text lines?

A. That's correct.

Q. And is it true that you wanted to change that word because you thought the word "prove" was more in line with the - - or the word "do" was more in line with the Marine message?

A. No. Prove was more in line with the Marine message. The Marines have something to prove. They're the ones that offer that.

* * *

[121]

* * *

Q. And the top of the page says MindMatics, do you see that?

A. Uh-huh.

Q. I'll read to you the second bullet point.

It says, MindMatics will deliver a Navy branded SMS (text) direct mobile marketing "push" program to

the cell phones of 150,000 adults 18 to 24 from an opt-in list of over 3 million. Do you see that?

A. Right.

Q. Was it your understanding when you reviewed this document that the text messages were going to be sent to 18 to 24 year olds?

A. Yes.

Q. Did you have an understanding that they would be sent to anyone other than 18 to 24 year olds?

A. No.

* * *

[122]

* * *

Q. So to go back to what we were talking about, intended recipients, the intended recipients were 18 to 24 year olds mostly, but not exclusively, male?

A. Yes.

Q. Was it your understanding that the text messages were only going to be sent to individuals who had provided consent previously to receive text messages sent from the Navy?

MS. REILLY: I'll object to the extent that that calls for a legal conclusion.

Q. (By Mr. Meyers) You can go ahead and answer.

A. It was our policy that any list procured by Campbell-Ewald had to be people that had opted in in some way to receive information about money for college, career opportunities, travel or adventure or some sale of the Navy.

Q. When you say it was our policy, was that a written policy?

A. It was a verbal policy that [123] Campbell-Ewald began to establish with us, and it was very critical because the list that we get for our general enlisted direct mail campaign is shared with our 26 different subordinate headquarters of Navy District Recruiting Commands, and they are able to send their own mailings out.

So if these people haven't opted in, then you know, we would be in trouble not only nationally but also locally. So it was our request that any list that they got would be opted in.

Q. And when you say list, would that include a list of text message recipients?

A. Yes.

Q. Was it your understanding at the time that Campbell-Ewald was aware of that policy?

A. Yes, because they were the – they were the pushers of the policy. They're the one that told us this is the standard we should maintain.

See, our local – there are 26 different local district recruiting offices. They can go out and buy lists, and we caution them not to because we don't know if they have been opted in.

Q. And, in fact, on Page 13 of that March 2006 recommendation, which is Gomez 082, in that [124] second bullet point, it states that the text will be delivered to 150,000 adults from an opt-in list of over 3 million?

A. Yes.

Q. And your understanding then was that all of the individuals who received it would have opted in to receiving those messages?

A. It was my understanding this was a kosher list.

Q. And the Navy was not -- Campbell-Ewald was not authorized that you know of to send text messages to individuals who had not opted in?

A. No, they were not.

Q. What's your understanding of the concept of consent, if you have one, for purposes of receiving a text message?

A. This would be someone -- let's say you sign up for an E-Mail. And upon creating your E-Mail account, it will ask you some personal information.

It will ask you what you're interested in, what's your likes or dislikes, and, you know, do you like gardening, do you like golf, and you check these things.

* * *

[131]

* * *

Q. Were there any conversations within the Navy about this 2006 text message going to individuals who had not previously consented?

A. Not that I'm aware of.

Q. Were there any conversations about individuals -- about the Navy becoming aware that this message was being sent to individuals who had not previously opted in?

A. Not that I'm aware.

Q. Mr. Buchschacher, do you expect that your contractors or -- excuse me the Navy's contractors will comply with all applicable laws and regulations?

A. Yeah, yes.

Q. Do you expect that Campbell-Ewald as your advertising company of record, that they will comply with all applicable laws and regulations?

A. Yes.

Q. Do you know if there is a provision in the Navy's contract with Campbell-Ewald that states that [132] Campbell-Ewald is obligated to comply at all times with applicable laws and regulations?

A. I don't know, but I suspect there is.

Q. Are you personally aware of the Navy ever authorizing advertisements that were in violation of Federal or State law?

A. No.

Q. Have you personally ever authorized an ad campaign that was in violation of Federal or State law that you can remember?

A. No.

Q. If you knew that an advertising campaign was in violation of a Federal of an applicable Federal or State statute, do you believe you would have authorized that?

A. I would not have.

Q. Are you familiar with the TCPA?

A. No, I'm not.

Q. I'll represent to you that the TCPA is the Telephone Communications Protection Act which is the statute that's relevant to this litigation.

Is it fair to say then you are not familiar with the TCPA as of May 2006?

A. I'm not familiar with it as it is today, [133] so ...

Q. If the TCPA was a Federal statute that relates to the transmission of text messages, would it have

been your expectation that Campbell-Ewald would have been familiar with it?

A. I would imagine their attorneys.

Q. Would it be your expectation that Campbell-Ewald again would comply with all statutes and regulations?

A. Yes.

MS. REILLY: Just to clarify for the record, it's Telephone Consumer Protection Act.

MR. MEYERS: What did I say?

MS. WYTSMA: Telephone Communications.

MR. MEYERS: That's embarrassing.

Q. (By Mr. Meyers)That doesn't change your answers at all, does it?

A. No.

* * *

[159]

Q. ..., how frequent was your contact with representatives of Campbell-Ewald.

A. Oh, very frequent.

Q. On a weekly basis?

A. Daily.

Q. Daily. And what type of communications would you have on a daily basis with Campbell-Ewald?

A. Usually I would get a phone call that goes, Hi, this is Rachel and Laura, and we're going to have a conference – oh, we have a conference, oh, how about that, I didn't know that.

And so, you know, they'd either want approval or they'd want to discuss something. Whenever I talked with members of the sales people organizations that

visited us, wanted us to sell stuff to Campbell-Ewald, I would call up Dan Rioux and discuss with him and say, hey, I just talked to somebody from Sports Illustrated, they stopped by, they wanted to say hi, they're planning a big thing in the spring and want us to be a part of it, I'll send it to you for consideration.

But, yeah, we were in constant contact with Campbell-Ewald on a daily basis.

Q. In Paragraph 5 of your Declaration, you [160] indicate that each campaign requires Naval Recruiting Command approval, oversight and review.

Can you describe what you mean by that?

A. Paragraph 5?

Q. The second sentence of Paragraph 5.

MS. REILLY: Line 12.

A. What do I mean by the campaign requires NRC approval of – Campbell-Ewald doesn't do anything without the approval of the United States Navy Recruiting Command or somebody in it.

Now, the problem is you don't know who the client is on any given day. One day it might be Cornell Galloway. Another day it may be Lee Buchschacher. Another day it may be Captain Buterbaugh, it may be Admiral Kilkenny, it may be someone else higher up.

Q. In terms of individuals at the Navy Recruiting Command that had contact with Campbell-Ewald concerning its advertising efforts on behalf of the Navy, are you able to approximate the number of individuals that would have some contact with Campbell-Ewald on a regular basis?

A. Yes.

Q. Approximately how many?

[161] A. Five program advertising managers, myself, the Deputy Director, John Byrd, the captain, our commander in charge of – you know, also the division chief and the other division chief from local marketing.

John Hamilton, our consultant that's – yeah, Edna who contacts them on contracting issues. So you have something between twelve and fifteen people contacting Campbell-Ewald on a daily basis.

Q. I'd like to talk a little bit about Exhibit 2 to your Declaration, and this is a document that I think was earlier described as a media plan; is that a correct characterization?

A. Communications plan?

Q. Okay.

A. Yes.

Q. Is there a difference between a communications plan and a media plan?

A. Well, could – a communications plan that might not have any media, you know. But generally when we talk about communications, we're talk – advertising, we're talking about the paid media that you're going to use and the timing of it and the messaging of it.

[162] Q. I'd like to direct your attention to – well, first, let me ask you a broader question.

Earlier counsel asked you whether this was a document that was intended to educate the Navy concerning potential media opportunities.

Was there – in your understanding was there any other purpose for presenting this communications plan to the United States Navy?

A. Again, in their annual plan, they do a lot of education. In their subsequent plans that they

delivered, they also include some education. Sometimes it's kind of talking down to you.

We understand, you know, but it's all part of training their account executives. They want to impart to the client, make sure they understand how it's going to be used, what is going to be used and so forth.

Q. Do you have any knowledge as to whether a communications plan must be approved by the United States Navy?

A. Yes, the strategic plan must be approved before we can move forward. That's a requirement by FISC.

24 Q. And I'd like to direct your attention [163] specifically to Page 15 of Exhibit 2. The caption of the slide is Exploratory Media.

A. Uh-huh.

Q. What was your understanding with respect to the first bullet under Exploratory Media?

A. Wireless/Mobile Marketing, and it would appear to be launched sometime in February to July time frame.

It expands and built upon, if you will, our direct response effort, using those different text messaging systems, the two basic ones.

Q. Okay. And what was your understanding of SMS at the time you received this document?

A. I didn't know what it means. I still can't remember. It's in the briefing later on what it stands for.

Q. Did you have an understanding that this mobile marketing was directed to text messages?

A. Yes. As soon as I see that, I know it's on telephones, but I just don't know – I don't remember

all these wireless application protocol and what all that means.

Q. But you had an understanding that Campbell-Ewald was proposing a text messaging [164] campaign?

A. Of course.

Q. And do you have any knowledge as to who reviewed this particular communications plan in December of 2005?

A. I would imagine we all did.

Q. And by all, who do you mean?

A. I mean the Captain Buterbaugh, everybody, you know, everyone I mentioned, the twelve to fifteen people I mentioned earlier.

Q. And do you have any knowledge as to whether it was reviewed by the Fleet Industrial Supply Center?

A. I believe so, but I'm not sure.

Q. I would like to turn your attention to Page 3 of your Declaration, Line 5.

A. Yes.

Q. Does that refresh your recollection as to whether the communications plan in December 2005 was reviewed by Fleet Industrial Supply Center?

A. Yes, I believe that's – that's my understanding.

Q. Did you approve of the communications plan presented by Campbell-Ewald in December 2005?

[165] A. Generally. I may have had some – every year I have comments that will go into a dark hole. I don't know whatever happens to them, but I do have comments every year.

Q. And after providing comments, do you approve of the communications plan on behalf of the NRC?

A. No, I didn't approve the communications plan on behalf of the NRC. The Admiral does that. But, you know, I made my points whatever they might have been, and I was never at -- I was never opposed to the use of texting because I knew it was the wave of the future.

Q. You said the Admiral did that. What do you mean by the Admiral did that?

A. Well, we -- again, it depends who's in charge of this week. I have been there where the only one that really approved it was the Director of Advertising. The Admiral didn't want to be involved.

I have been there where last Admiral, Admiral Faller went line for line for line for line and, in fact, wanted to be involved in the writing of it with Campbell-Ewald. So it just depends who's

* * *

[167]

* * *

Q. And, sir, you testified earlier that you had an opportunity to review this Power Point Presentation in March of 2006, correct?

A. Yes.

Q. Do you have any knowledge as to whether the United States Navy approved the recommendations that were contained in this Power Point Presentation?

A. Yes.

Q. And do you know who on behalf of the United States Navy approved the recommendations?

A. Well, again, using the text message as a resource, was approved in the larger plan, and then we

approved – or marketing and advertising approved the specific plan.

* * *

[169]

* * *

Q. ... Based on the presentation that Campbell-Ewald provided in March of 2006, which is Exhibit 3 to your Declaration in front of you, did you have an understanding whether Campbell-Ewald intended to use any subcontractors to assist it in actually executing a text message –

A. Of course, yes.

Q. And did you have an understanding that that subcontractor was MindMatics based on the presentation made to you in March of 2006?

A. It was not top of mind, but, yes, okay.

Q. It was information that was disclosed to the United States Navy?

A. Yes.

Q. And the United States Navy had no objection to using a subcontractor to assist in excusing its Text Message Campaign?

A. Yes, just like we have no objection if we want to advertise on CBS that CBS launch the commercial for us which they have to on their [170] network.

Q. Do you have any knowledge whether the base contracts between Campbell-Ewald and the United States Navy contemplated the use of third party contractors?

A. Oh, I'm sure. It requires it.

Q. Why does it require it?

A. Well, first of all, they inherited a couple of those contractors. One in specifically was our Fulfillment Center at the time and their Call Center. They had to take over from BBDO. So under CLIN 1 of the contract, they have to fund those activities.

So, yes, we're familiar that advertising agencies do not do all of the work, that they farm it out to experts in the various fields.

Q. And I believe you testified earlier today that you had an opportunity to review the copy for the text message that was sent in May of 2005, is that correct?

A. Yes.

Q. All right. And did you, in fact, make any changes to that copy?

A. This is when – we made the change because [171] it sounded too Marine copy, yes, I did make a change then.

Q. And did you provide your changes to Campbell-Ewald.

Q. And did you provide your changes to Campbell-Ewald?

A. Yes, I did, through their account executive.

Q. Do you know whether Campbell-Ewald made that change?

A. I assume they did.

Q. And did you approve the copy that was ultimately sent on behalf of the United States Navy in May of 2005?

A. Yes.

Q. I'm sorry. Counsel just reminded me let me rephrase that question. I got my date wrong.

Did you ultimately approve the copy that was used in the text message that was sent in May of 2006?

A. Yes.

Q. And you approved of the Text Message Campaign generally, is that correct?

A. That is correct.

* * *

[179] you had indicated that you spoke with someone from Campbell-Ewald almost daily, is that fair?

A. Almost daily, yes, even if it was just a secretary telling me they're in a meeting still.

Q. That's what I want to ask. Are some of those daily conversations what I would call non-substantive conversations, or were they about being in a meeting or scheduling a call?

A. Yeah, some of them are real short conversations like can you send me a copy of umpty, umpty, umpty ump or something like that.

Q. Is it fair to say that you did not contact Campbell-Ewald on a daily basis with you initiating the

A. Yes, it is fair to say I initiated many of the calls. They also initiated calls to me.

Q. Did you initiate calls to instruct them on how to run any campaigns on a daily basis?

A. I would call them and say do you have any money left over that maybe we could do something for spring break this year or, you know – so, yes, we did call and ask if there were things we could include in the plan, get included in the plan.

Q. Broad plans that you thought maybe could

* * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE GOMEZ, individually and on behalf of a class of similarly situated individuals,	)	No. CV 10-2007-DMG (CW)
Plaintiff,	)	CONFIDENTIAL FOR ATTORNEYS' EYES ONLY
vs.	)	
CAMPBELL-EWALD COMPANY, a Delaware corporation,	)	
Defendant.	)	

*** CONFIDENTIAL – ATTORNEYS' EYES ONLY ***

DEPOSITION OF:

DANIEL RIOUX
Friday, January 13, 2012
9:09 a.m.

* * *

[57]

* * *

Q How does that objective differ than support recruiting efforts?

A Supporting recruiting efforts might be far more specific than a branding effort.

Q Do you know what that term meant with respect to this contract?

A I have a pretty good idea of what that meant.

Q What is that idea?

A Beyond building brand awareness, actually generating leads for Navy Recruiting Command to work and, eventually, hopefully, convert the contracts.

Q But there's a distinction between creating brand awareness and actually generating leads?

A Yes.

Q And is there a distinction between increasing share of voice and generating leads?

A Yes. Lead generation doesn't necessarily require an increased share of voice to be more effective than brand advertising, but increasing share of voice is going to be measurable in advertising that's visible to a broader general public.

Q Okay, so Campbell-Ewald had multiple objectives, only one of which, amongst many, was specifically to support recruiting efforts; is that correct?

[58] A Well, no, that's not exactly right, because all of these efforts ultimately aid Navy Recruiting Command in their effort to recruit.

Q What's your understanding what the word "recruit" means?

A When I'm using the phrase "recruit," I mean for a Navy recruit to actually sign up a sailor for active duty service or reserve service.

Q So recruiting is when the Navy, for lack of a better term - I'm not a military guy - actually signs up someone to --

A That's right, sign up.

Q -- to go into or to enlist in the Navy.

A That's right.

Q And Campbell-Ewald is not involved in the actual signing up of the individual to join the Navy, correct?

A That's right.

Q And Campbell-Ewald is not actually involved in deciding whether someone satisfies the Navy's criteria and should go forward with the recruiting process, correct?

A Correct.

Q Campbell-Ewald doesn't staff any recruiting offices?

A That's right, we don't.

* * *

[63]

* * *

(Record read.)

MS. WYTSMA: Objection, it calls for speculation.

The witness can answer as to his personal knowledge.

THE WITNESS: I'm not aware of any such campaigns.

BY MR. MEYERS:

Q To be clear, you're not aware, at this point, of Campbell-Ewald ever undertaking a campaign or performing any task for the Navy that Campbell-

Ewald knew to be in violation of federal or state law or regulation?

A No, I'm not aware of any such campaign.

Q Are you aware of the Navy ever authorizing Campbell-Ewald to do anything that was in violation of federal or state law or regulation?

A No, I'm not aware.

Q Based on your experience working with the Navy over the last decade or so, do you have any reason to believe that the Navy would ever authorize any campaign or task related to a campaign that was in violation of federal law?

A No.

* * *

[112]

* * *

A Well, sure. We wouldn't want people to receive an unwanted message in their inbox and risk creating ill will toward the Navy. So that was important for us, yes.

Q MindMatics clearly references an RFP response as opted-in information.

Prior to receiving that response, did you specifically ask MindMatics to mention opt-in information in their RFP response?

(Interruption in proceedings.)

THE WITNESS: I'm sorry, can you repeat that.

BY MR. MEYERS:

Q I'll just ask it again.

Prior to receiving this RFP response from MindMatics in February of '06, did you ask MindMatics

to include in their response information about the opt-in list of how the recipients were opted in?

A I don't think that was specifically called out in the RFP, since it was requesting more general responses to mobile click-to-call tactics. And I'd have to review the RFP here before I can answer that with any certainty.

Q Okay. I'll ask this question.

* * *

[119]

* * *

Q And in those conversations, Mr. Greene explained that the list was generated from individuals essentially asking for a free ringtone or a mobile application of some sort?

A That's right. Ringtones, wallpapers, twitch games, things of that nature.

Q Did you ever ask Mr. Greene, or anyone at MindMatics, whether there was any – whether any of the individuals on that list had specifically requested to receive information about money for college, career opportunities, or travel or adventure?

A No. I don't think that was part of our conversation.

Q And he never indicated that – any of those categories of information as part of the list?

A My recollection is what MindMatics had offered in terms of list select was limited to the demographic information that we discussed earlier: Age, gender. Sometimes they would get an e-mail or e-mail address as well as a cell phone number.

Q So your communications with MindMatics about the [120] opt-in list related mostly to age and gender?

A Yes, the demographic specifics.

Q And did you do anything – what steps did you take to verify that the individuals who had received this text message sent in 2006 were between the ages of 18 and 24?

A I asked Jordan Greene to produce a revised proposal based on the recommendation we carried forward to Navy, eliminating the other mobile tactics that were included in their original response to our RFP, and to refine that to the specifics of the SMS text message media buy, and in response to that request, the response states that they will deliver these messages to people in that age group.

Q But other than relying on MindMatics' representations that they would deliver the texts to people in that age group, is there anything else that you or anyone at Campbell-Ewald did to actually verify how they would be able to do that?

A No.

Q You essentially took them at their word that they would deliver it to 18- to 24-year-olds; is that correct?

A Yes. We believed they would do what they said they would do.

[121] Q Was there any discussion of – well, strike that.

Why did you include the opt-in information in the March 2006 recommendations to the Navy? Why did you feel that that was something that needed to go into the recommendations?

A Again, it was something that MindMatics had offered up as a selling point for why they could be trusted and why this list would be suitable for use for the Navy. That, I guess, is my simplest answer.

MS. WYTSMA: Could we go off the record for one second?

MR. MEYERS: Sure. Off the record.

(Recess taken.)

(Record read.)

(Plaintiff Exhibit 39 was marked for identification by the reporter.)

BY MR. MEYERS:

Q We're back on the record.

Mr. Rioux, I'm handing you what's been marked as Exhibit 39. Take a moment to look at that, please.

And while you keep reviewing, for the record, this is an e-mail dated Monday, May 15, 2006 from – well, we'll leave it at that.

Have you seen this document before?

* * *

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE GOMEZ, individually and on behalf of a class of similarly situated individuals, Plaintiff, v. CAMPBELL-EWALD COMPANY, a Delaware corporation, Defendant.	Case No. CV 10-2007-DMG (CWx) Assigned to Hon. Dolly M. Gee **DEFENDANT CAMPBELL-EWALD COMPANY'S OBJECTIONS AND RESPONSES TO PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSION**

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, defendant Campbell-Ewald Company

("C-E") objects and responds to plaintiff Jose Gomez's First Set of Requests for Admissions ("Requests") as follows:

* * *

REQUEST FOR ADMISSION NO. 57:

Request:

The written contract between Campbell-Ewald and the Navy, executed in or about 2005 and relating to the provision of advertising services for Navy recruitment, does not state that Campbell-Ewald is an agent of the Navy.

Response:

C-E objects that "states" is vague and ambiguous. C-E also objects that the document speaks for itself.

Subject to the foregoing objections, including but not limited to the general objections, C-E admits that contract between C-E and the Navy executed in 2005 does not explicitly state that Campbell-Ewald is an "agent" of the Navy.

REQUEST FOR ADMISSION NO. 58:

Request:

The written contract between Campbell-Ewald and the Navy, executed in or about 2005 and relating to the provision of advertising services for Navy recruitment, does not state that Campbell-Ewald is an agent of the federal government.

Response:

C-E objects that "states" is vague and ambiguous. C-E also objects that the document speaks for itself.

Subject to the foregoing objections, including but not limited to the general objections, C-E admits that contract between C-E and the Navy executed in 2005

docs not explicitly state that Campbell-Ewald is an "agent" of the federal government.

* * *

REQUEST FOR ADMISSION NO. 72:

Request:

Prior to the transmission of the Navy text messages to Gomez and the Class, Campbell-Ewald did not ask Mindmatics for any documents reflecting the prior express consent of any person to receive text messages from Mindmatics.

Response:

C-E objects that this Request is not reasonably calculated to lead to the discovery of admissible evidence. C-E also objects to this Request as outside the scope of the Court's November 16, 2011 order permitting "targeted ... requests for admission for the purpose of identifying the scope of the relationship between Defendant C-E and the U.S. Navy, as well as the authorizations given for, and communications regarding, the 2005 [sic] text message campaign."

Subject to the foregoing objections, including but not limited to the general objections, C-E responds as follows:

Admitted.

REQUEST FOR ADMISSION NO. 73:

Request:

Prior to the transmission of the Navy text messages to Gomez and the Class, Campbell-Ewald did not ask Mindmatics for any documents reflecting the prior express consent of any person to receive text messages from Campbell-Ewald.

Response:

C-E objects that this Request is not reasonably calculated to lead to the discovery of admissible evidence. C-E also objects to this Request as outside the scope of the Court's November 16, 2011 order permitting "targeted ... requests for admission for the purpose of identifying the scope of the relationship between Defendant C-E and the U.S. Navy, as well as the authorizations given for, and communications regarding, the 2005 [sic] text message campaign."

Subject to the foregoing objections, including but not limited to the general objections, C-E responds as follows:

Admitted.

REQUEST FOR ADMISSION NO. 74:

Request:

Prior to the transmission of the Navy text messages to Gomez and the Class, Campbell-Ewald did not receive any documents from Mindmatics reflecting the prior express consent of Plaintiff Gomez to receive text messages from Mindmatics.

Response:

C-E objects that this Request is not reasonably calculated to lead to the discovery of admissible evidence. C-E also objects to this Request as outside the scope of the Court's November 16, 2011 order permitting "targeted ... requests for admission for the purpose of identifying the scope of the relationship between Defendant C-E and the U.S. Navy, as well as the authorizations given for, and communications regarding, the 2005 [sic] text message campaign."

Subject to the foregoing objections, including but not limited to the general objections, C-E responds as follows:

Admitted.

REQUEST FOR ADMISSION NO. 75:

Request:

Prior to the transmission of the Navy text messages to Gomez and the Class, Campbell-Ewald did not receive any documents from Mindmatics reflecting the prior express consent of Plaintiff Gomez to receive text messages from Campbell-Ewald.

Response:

C-E objects that this Request is not reasonably calculated to lead to the discovery of admissible evidence. C-E also objects to this Request as outside the scope of the Court's November 16, 2011 order permitting "targeted ... requests for admission for the purpose of identifying the scope of the relationship between Defendant C-E and the U.S. Navy, as well as the authorizations given for, and communications regarding, the 2005 [sic] text message campaign."

Subject to the foregoing objections, including but not limited to the general objections, C-E responds as follows:

Admitted.

REQUEST FOR ADMISSION NO. 76:

Request:

Prior to the transmission of the Navy text messages to Gomez and the Class, Campbell-Ewald did not receive any documents from Mindmatics reflecting the prior express consent of any person to receive text messages from Mindmatics.

Response:

C-E objects that this Request is not reasonably calculated to lead to the discovery of admissible evidence. C-E also objects to this Request as outside the scope of the Court's November 16, 2011 order permitting "targeted ... requests for admission for the purpose of identifying the scope of the relationship between Defendant C-E and the U.S. Navy, as well as the authorizations given for, and communications regarding, the 2005 [sic] text message campaign."

Subject to the foregoing objections, including but not limited to the general objections, C-E responds as follows:

Admitted.

REQUEST FOR ADMISSION NO. 77:

Request:

Prior to the transmission of the Navy text messages to Gomez and the Class, Campbell-Ewald did not receive any documents from Mindmatics reflecting the prior express consent of any person to receive text messages from Campbell-Ewald.

Response:

C-E objects that this Request is not reasonably calculated to lead to the discovery of admissible evidence. C-E also objects to this Request as outside the scope of the Court's November 16, 2011 order permitting "targeted ... requests for admission for the purpose of identifying the scope of the relationship between Defendant C-E and the U.S. Navy, as well as the authorizations given for, and communications regarding, the 2005 [sic] text message campaign."

Subject to the foregoing objections, including but not limited to the general objections, C-E responds as follows:

Admitted.

* * *

REQUEST FOR ADMISSION NO. 81:

Request:

The 2006 Navy text message campaign approved by the Navy called for text messages to be sent only to persons between and including the ages of 18 and 24 years old.

Response:

C-E objects that this Request is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing objections, including but not limited to the general objections, C-E responds as follows:

Admitted.

* * *

REQUEST FOR ADMISSION NO. 85:

Request:

Campbell-Ewald drafted the copy for the 2006 Navy text message.

Response:

C-E admits that C-E drafted the copy for the 2006 Navy text message with input from the Navy.

REQUEST FOR ADMISSION NO. 86:

Request:

The 2006 Navy text message copy was written by Campbell-Ewald employees.

Response:

C-E admits that the 2006 Navy text message copy was written by C-E with input from the Navy.

* * *

REQUEST FOR ADMISSION NO. 93:

Request:

The Navy only changed one word to the copy for the 2006 Navy text message.

Response:

Admitted.

* * *

REQUEST FOR ADMISSION NO. 95:

Request:

Pursuant to the contract governing the relationship between Campbell-Ewald and the Navy as of May 2006, Campbell-Ewald was obligated to comply with all applicable federal statutes and regulations.

Response:

Defendant objects to this Request as overly broad and ambiguous as to "the contract." Subject to the foregoing objections, including but not limited to the general objections, C-E responds as follows:

Denied. However, C-E admits that as a general proposition it was obligated to comply with federal law.

REQUEST FOR ADMISSION NO. 96:

Request:

Federal contract number N00600-00-D-6048 required Campbell-Ewald to comply with all applicable federal statutes and regulations.

Response:

C-E objects to this request as duplicative of Request No. 55. C-E also objects that the document speaks for itself.

Subject to the foregoing objections, including but not limited to the general objections, C-E admits that Contract No. N00600-00-D-6048 required C-E to "comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under [the] contract."

REQUEST FOR ADMISSION NO. 97:

Request:

Other than the one-word revision made by Lee Buchschacher on April 28, 2006, the Navy did not participate in the drafting of the copy for the 2006 Navy text message.

Response:

C-E objects to "participate in the drafting" as vague and ambiguous. C-E also objects to this Request on the basis that Plaintiff intentionally delayed filing suit against C-E and as a result of the delay, C-E is prejudiced in its ability to respond to this Request. Subject to the foregoing objections, including but not limited to the general objections, C-E responds as follows:

After a reasonable inquiry, C-E lacks sufficient knowledge or information to form a belief as to the truth or falsity of the request and on that basis denies it.

REQUEST FOR ADMISSION NO. 98:

Request:

The Navy never communicated to Campbell-Ewald any interest or desire for the 2006 Navy text message campaign to violate any federal statutes or regulations.

Response:

Admitted.

REQUEST FOR ADMISSION NO. 99:

Request:

As of May 2006, Campbell-Ewald was not aware of any intent or desire of the Navy to have the TCPA violated in effectuating the 2006 Navy text message campaign.

Response:

Admitted.

REQUEST FOR ADMISSION NO. 100:

Request:

As of May 2006, Campbell-Ewald was not aware of any intent or desire by the Navy to not have Campbell-Ewald comply with all relevant federal statutes and regulations with respect to the 2006 Navy text message campaign.

Response:

Admitted.

* * *

MIME-Version:	1.0
Content-Type:	multipart/related; boundary="---=_NextPart_01CBDE2E.EBFA1C5O"
Content-Location:	file:///C:/6318C6B6/0000007_0000046.htm
Content-Transfer-Encoding:	quoted-printable
Content-Type:	text/html; charset="us-ascii"
Attachment	Attachment Attachment Attachment Attachment

From: lee.buchschacher@navy.mil
Sent: Friday, April 28, 2006 12:20 PM
To: dgrayson@campbell-ewald.com
Cc: cornell.galloway@navy.mil; jgaulzet@campbell-ewald.com; kgebby@campbell-ewald.com
Subject: FW: Approval – MindMatics & go2 Wireless Initiatives
Attachments: wireless_mindmatics-go2copyFINAL.doc

Daidria,
The text is approved provided we change the word "prove" to "do" in both text lines.
Lee Buchschacher
Director.
Marketing and Advertising Plans Division
901-874-9419

- - - Original Message - - -

From: Grayson, Daidria [mailto:dgrayson@campbell-ewald.com]

Sent: Thursday, April 27, 2006 10:29

To: Buchschacher, Lee A CIV CNRC MILLINGTON, TN, N9

Cc: Galloway, Cornell CIV CNRC MILLINGTON, TN, N9, Gaulzetti, Joseph; Gebby, Kelly

Subject: Approval – MindMatics & go2 Wireless Initiatives

Good morning Lee,

I hope all is well. Attached please find copy for our wireless text blasts with MindMatics and the cellular landing page with go2. For MindMatics, an outbound text blast is sent directly to consumers' phones containing the provided copy with a click-to-call number sending the caller directly to the call center to receive more information. For Go2, the caller will click on our logo or the call-to-action "GET YOUR FREE VIDEO" placed underneath, which will lead to a jump page containg the attached copy. The number in the copy is also click-to-call, directing the caller to the call-center. Once the copy is approved, MindMatics and go2 will provide screen shots of the text within the phone frame for final approval, which will be sent to you or Cornell (depending on when it is received) for final approval.

*FYI We have copy from one more wireless vendor that will be forwarded for your approval by tomorrow at the latest.

Please do not hesitate to contact me with any questions and/or concerns. Thank you and have a wonderful day!

–

Daidria R. Grayson
Assistant Account Executive – Navy
30400 Van Dyke
Warren, MI 48093-2316
Phone: (586) 558-6340
Fax: (586) 558-6584
dgrayson@campbell-ewald.com

Wireless-Mindmatics/go2
E6-NV-Q-0225

Mindmatics text blast (160 characters)

Destined for something big? Prove it in the Navy. Get a career. An education.
And a chance to serve a greater cause. For a FREE Navy video, call [redacted].

Go2 landing text (6 lines- max 32 characters per line)

Destined for something great?
You can prove it in the Navy.
Do your part in a bigger cause.
Get a career and an education.
For your FREE Navy video,
call [redacted].

MIME-Version:	1.0
Content-Type:	multipart/related; boundary="—=_NextPart_01CBDE2F.11E57270"
Content-Location:	file:///C:/6318CA36/0000007_0000106.hlm
Content-Transfer-Encoding:	quoted-printable
Content-Type:	text/html; charset="us-ascii"
Attachment	Attachment Attachment Attachment

From: cwoolums@campbell-ewald.com
Sent: Friday, April 28, 2006 1:59 PM
To: dgrayson@campbell-ewald.com
Cc: rallston@campbell-ewald.com
Subject: Re: go2/Mindmatics – Client Approval

Per our discussion, I'm OK with it.
Thanks and have a nice weekend.
cw

From: "Grayson, Daidria" <dgrayson@campbell-ewald.com>
Date: Fri, 28 Apr 2006 16:40:39-0400
To: "Woolums, Chad" <cwoolums@campbell-ewald.com>
Cc: "Hodges, Mandy" <mhodges@campbell-ewald.com>, "Gebby, Kelly" <kgebby@campbell-

ewald.com>, "Gaulzetti, Joseph" <jgaulzet@campbell-ewald.com>
Conversation: go2/Mindmatics - Client Approval
Subject: go2/Mindmatics - Client Approval

Hi Chad!

The copy for the go2 and Mindmatics wireless campaigns are approved by Lee with one change: changing "prove" in both pieces of copy to "do." The word "prove" appears to align moreso with the Marines and may give the idea that in the Navy, you have to "prove" yourself, manhood, ambition, leadership skills. etc. If you agree with the change, please reply in confirmation and I will proceed with sending the approved copy to MindMatics and go2.
Have a great weekend!

–

Daidria R. Grayson
Assistant Account Executive – Navy
30400 Van Dyke
Warren, MI 48093-2316
Phone: (586) 558-6340
Fax: (586) 558-6584
dgrayson@campbell-ewald.com

Wireless-Mindmatics/go2
E6-NV-Q-0225

Mindmatics text blast (157 characters)

Destined for something big? Do it in the Navy. Get a career. An education. And a chance to serve a greater cause. For a FREE Navy video, call [redacted].

Go2 landing text (6 lines – max 32 characters per line)

Destined for something great?
You can do it in the Navy.
Do your part in a bigger cause.
Get a career and an education.
For your FREE Navy video,
call [redacted].

SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS *OFFEROR TO COMPLETE BLOCKS 12, 17, 23, 24, AND 30*			1 REQUISITION NUMBER N6671505RCS3063	PAGE 1 OF 47
2 CONTRACT NO. N00140-06-D-0005	3 AWARD/ EFFECTIVE DATE 20-Nov-2006	4 ORDER NUMBER	5 SOLICITATION NUMBER N00140-05-R-0038	6 SOLICITATION ISSUE DATE 10-Jun-2005
7 FOR SOLICITATION INFORMATION CALL	a NAME FRANK MORETTI		b TELEPHONE NUMBER (No Collect Calls) 215-697-9611	8 OFFER DUE DATE/LOCAL TIME 08-Jul-2005 16:00

9 ISSUED BY CODE N00140 FISC NORFOLK CONTRACTING DEPARTMENT PHILADELPHIA OFFICE 700 ROBBINS AVENUE, BUILDING 2B PHILADELPHIA PA 19111-6083 TEL: 215-697-9550 FAX: 215-697-9554	10 THIS ACQUISITION IS _X_ UNRESTRICTED * * *	11 DELIVERY FOR FOB DESTINATION UNLESS BLOCK IS MARKED * * *	12 DISCOUNT TERMS
		_X_ 13a THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700)	
		13b RATING D0-S10	
		14 METHOD OF SOLICITATION ___ RFQ __ IFB _X_ RFP	

15 DELIVER TO CODE ___	16 ADMINISTERED BY CODE _S2305A_
SEE SCHEDULE	DCM DETROIT US ARMY TANK AND AUTOMOTIVE CMD (TACOM) WARREN MI 48397-5000
17 a CONTRACTOR/ CODE 1P2G8 FACILITY CODE ___ OFFEROR CAMPBELL EWALD COMPANY JIM PALMER DBA CAMPBELL EWALD ADVERTISING 30400 VAN DYKE AVENUE WARREN MI 48093-2316 TEL 5860558-7209	* * *

* * *

_ 27a SOLICITATION INCORPORATES BY REFERENCE FAR 52 212-1 52212-4 FAR 52212-3 AND 52 212-5 ARE ATTACHED X 27b CONTRACT/PURCHASE ORDER INCORPORATES BY REFERENCE FAR 52 212-4 FAR 52212-5 IS ATTACHED	ADDENDA _ ARE _ ARE NOT ATTACHED ADDENDA X ARE _ ARE NOT ATTACHED

* * *

CLAUSES INCORPORATED BY FULL TEXT

CLIN Definitions.

1. CLINs 0001/0004/0007/001/0013 – Advertising Services

Offerors shall propose a monthly unit price to perform Advertising Services in accordance with the Statement of Work. The amount entered under CLIN 0001 and corresponding option year CLINs will be multiplied by 12 months to arrive at the total for CLIN 0001 and the corresponding option year CLINs. Offerors shall also propose a monthly unit price for the four following option years to perform services in those periods. The offeror should take inflation and other price-related factors into consideration when proposing prices for the option years. During the NRSP Conference held in June of each year, the contractor and the Government will agree on the NRSP for the upcoming contract period, and the written NRSP will be incorporated into the contract. During the conference, there may be adjustments in the option year's NRSP, but there will be no adjustment in the option year's price.

The offeror shall propose a firm fixed-price monthly unit price to perform all services related to the applicable year's recruiting efforts. The price includes, but is not limited to labor (prime and subcontractor), indirect costs (overhead, G&A, fringe, etc.), other direct expenses (travel, material telephone charges, paper reproduction, etc.), and the facilitation of the yearly annual NRSP Conference, including the price for the facility. Therefore, offerors are encouraged to manage their costs with the understanding that their monthly unit price is the only payment that will be made to cover all the costs and profit to administer the

contract during a given performance period (with the exception of Space Charges and Media Placement).

2. CLINs 0002/0005/0008/0011/0014 Space Charges and Media Placement

These CLINs will support "pass through" costs of space charges and media placement costs for various media to include, but not limited to, television, radio, internet, periodical, print, and outdoor buys. The not-to-exceed estimated ceiling amount may or may not be fully funded, depending upon budgetary determinations from higher authority. The contractor shall use its best efforts to obtain the lowest commercial rate available for media placement. The offeror will pass on any applicable rebates and/or discounts to the Government (Media placement cost-rebate/discount = media price). All media discounts and merchandising credits shall accrue to the Government. Labor or any associated costs for space charges and media placement shall be proposed under the CLINs for Advertising Services. 0001/0004/0007/0010/0013.

3. CLINs 0003/0006/0009/0012/0015 – Additional Advertising Services

The offerors shall provide a fully burdened blended hourly rate (not including ODC's) for each of the six (6) organizational segments for these CLINs. The fixed price blended hourly rates proposed by the offeror for the six (6) organizational segments below will be used to place task orders for services that fall outside the scope of the strategic plan, but remain within the total scope of the contract.

(1) Research, Strategic Plan, Program Development and Assessment

(2) Creative Strategy, Execution, and Production

(3) Media and Related Services

(4) Prospect Relationship Management & Fulfillment Operations

(5) Events Marketing

(6) Account Management and Team Execution

Note: These CLINs will be awarded on a task order basis. if and when the Government has a requirement that is not covered by the strategic plan, but is within the scope of the Statement of Work. There is no guarantee that this CLIN will be utilized. However, if it is, the contractor will receive a statement of work from the PCO office to propose on. The offeror will propose the number of hours, the labor segment Mix (from the six segments above) and ODC's. After negotiation of the hours and ODC's, a firm fixed-price task order will be put in place based on the pre-determined hourly rates proposed for the contract.

STATEMENT OF WORK

C.1 OVERVIEW

The purpose of the Navy Recruiting Advertising program is to:

1. Increase awareness of and favorable attitudes of the Navy and Navy Reserve as a career choice by specific diverse target audiences.
2. Generate eligible, quality leads and prospect relationships for recruiter follow-up.
3. Aim of communications is to drive prospects to www.navy.com, www.elnavy.com or www.navyreserve.com and generate traffic into local Navy recruiting stations.

4. The Navy websites are used to increase familiarity of Navy's career opportunities and benefits, assist diverse young adults in the decision making process, prepare prospects for direct contact with a recruiter by easing fear/raising their knowledge of the Navy, and generate leads.
5. Use internet, interactive marketing, and other forms of electronic marketing to position Navy as a modern high technology service and appeal to diverse prospects in cutting edge forms they demand.

All advertising and prospect engagement activities are to be carried out at the best value to the Government consistent with standards necessary to meet recruiting objectives. Based on historical data, the Navy expects its annual contract budget to range from [redacted] Within this budget is included all advertising services including, but not limited to, media planning and buying, creative development, account planning management, call center, web site management, leads management, and fulfillment center operations performed by the contractor or its subcontractors. Items not included are most printing, which is done separately by the government and procurement of fulfillment and promotional items. Budget figures provided here are for planning purposes only – Congress and Department of the Navy (DON) will decide exact budget amounts. Changes in the allocated advertising budget will impact the advertising and marketing plan and the programs that are executed. Changes in the Navy's recruiting goals may have similar effects on plans and programs. Budget and goal changes can occur at anytime,

including the execution year – the contractor must be flexible enough to handle these changes and the subsequent impact on the communications program. Accordingly, Contract Line Item Numbers (CLINs) 0002/0005/0008/0011/0014 and 0003/0006/0009/0012/0015 are ceiling-priced and there is no guarantee the Government will order the maximum amount identified in the Schedule of Supplies/Services and Prices for those CLINs.

The principal target audiences in the Navy communications program are determined by recruiting goals and the communications strategy and include prospects of diverse demographics from all areas of the country. Targets may include (approximate age groups included):

1. High school students (juniors and seniors) and recent graduates, ages 17–24.
2. College students (two-year and four-year) and recent graduates under the age of 26.
3. Members of the workforce under the age of 34 for active duty or 37 for reserve duty.
4. Professionals such as doctors, dentists, nurse specialists, engineers, lawyers, etc. (including those in school and in the workforce) that are under the age of 40.
5. Members of the general public who may influence the attitudes and decisions of the above primary prospects such as parents, other family members,. high school counselors, etc.
6. Pre-17 year aids.
7. Veterans (prior active and/or reserve service).

The Navy's recruiting advertising program is directed toward the recruitment of personnel to fill vacancies in

enlisted and officer programs for both the active and reserve components. The numbers and quality of personnel required for each of these Navy's programs can vary in response to factors like the world situation, past shortfalls in recruiting, the internal Navy recruitment rate, and personnel ceiling established by Congress. Enlisted and officer goals for Fiscal Year 2005 (FY05) are listed in Attachment J-1, as well as those anticipated for FY06 (1 Oct 05 – 30 Sep06). Actual goals for FY06 may vary significantly from those shown and will not be known until Summer 2005. Navy endeavors to attract qualified prospects to fill its requirements from all walks of life, all areas of the country and diversity representative of the nation itself.

The advertising contractor, hereafter referred to as the contractor, in coordination with the Navy, shall create a Strategic Communications Plan (Strategic Plan) for Navy approval, outlining strategic level communications plan including marketing goals for the following 3 years (at a minimum). Annually, the contractor must develop a one-year Advertising and Marketing Plan (Annual Plan) for the next FY for approval by senior level Navy management that achieves the strategic goals for that year, meets Navy's recruiting goals set for that FY, and any special goals or needs the Navy may specify.

During the execution year, the Navy has projects of all types in preparation and/or operation. These projects can range from creation and production of a single print advertisement to planning and executing an on-line communications campaign. It is essential that the contractor's procedures, including its subcontractors,

enable the routine and timely production of all materials and their storage and preservation.

C.2 SCOPE

The contractor, shall be a Full-Service Advertising Agency (defined as an advertising firm that can perform the major functions classified as creative services; account services; marketing services, including media and internet services, marketing research, and promotion; direct response services; and finance and management) capable of executing at least the following advertising and advertising-related activities either through use of in-house personnel or subcontracted personnel.

1. Primary and secondary market research, including target audience identification market segmentation, and analysis.
2. Comprehensive account planning and strategy plan development.
3. Creative design, development, and production of all media (including, but not necessarily limited to TV, radio, print including magazine and newspaper, on-line advertising, web site and other interactive activities, video, and other electronic media).
4. Media planning, placement, and purchase (including, but not necessarily limited to, TV, radio, print, on-line, interactive, video, and other electronic modes).
5. Direct Response activities encompassing, but not necessarily limited to direct mail and direct email (national and local), direct TV or direct radio.

6. Comprehensive fulfillment operations.

7. Database management, prospect relationship management, and other information technology support activities consistent with current and evolving advertising industry practices. Contractor shall be responsible for the hosting, operation, maintenance, and upgrading of the Navy Advertising Leads Tracking System (NALTS) leads database system.

8. Contact Response or "call Center" operations.

9. Events marketing activities to include but not necessarily limited to management, scheduling, tracking, and upgrading of the Navy events marketing properties and activities and monitoring of its proper, effective use and return on investment. Maintenance of a method for the scheduling and display of scheduled events (possibly web based) and coordination with the various property vendors and NRDs is required.

10. Operation, maintenance, and upgrading of a state-of-the-art Internet website for Navy recruiting that is appealing and useful to the primary target audience, influencers, and diversity targets. At a minimum the contractor will at least initially operate and maintain the existing Navy.com, ElNavy.com and NavyReserve.com web sites.

11. Public relations capabilities, including the ability to develop and disseminate Public Service Announcements (PSAs) and to execute similar

promotional and image-building initiatives through free media channels.

12. Management and financial interfaces with all contracting and subcontracting components.

13. Training of its own personnel, as required, to meet the above Navy requirements and maintain state-of-the-art industry standard advertising capabilities and account management support in support of the Navy Recruiting mission.

14. Monitoring of all advertising and marketing efforts, analyzing and reporting on their effectiveness and return on investment is a requirement.

15. Make presentations periodically, both in person and via conference call and/or VTC, either at the contractor's facilities, CNRC, or other Navy locations. (The contractor is required to have VTC capability). Contractor will be required to transmit documents and briefs electronically (Word documents, Excel, Power Point, etc) and exchange email correspondence with Navy. All documents and emails must be able to interface with and be fully readable by Navy personnel on the Navy's PC based NMCI compliant system without any additional conversions/importing actions by Navy.

16. Crafting effective communications that appeal to this target audience in all areas of the country, a variety of ethnic, religious and economic groups ensuring a diverse stream of prospects for all

Navy programs, officer and enlisted, active and reserve.

Contractor services are directed to the Navy Active and Reserve Components recruiting and Navy awareness/brand building efforts. The contractor will interact and coordinate with other programs such as the DOD Joint Advertising Market Research Studies (JAMRS) and with other service recruiting advertising organizations as needed and appropriate.

Services to be performed include all advertising-related services directly prescribed by the Contracting Officer or proposed by the contractor and approved or implementation by the Contracting Officer. In all instances, the Navy Recruiting Command (CNRC) holds the ultimate right of approval for all deliverables under this contract.

While the remainder of this section and attachments included in Section J include and identify activities and practices that either are currently in the Navy's existing advertising program or may be desired elements in the Navy advertising program and for which the contractor must provide adequately for their continuation, evolution, or addition under this new contract, it is required and encouraged that the contractor continually propose alternate approaches to achieve the objectives of the Navy communications and that achieve recruiting goals. Similarly, the contractor is encouraged to continually propose approaches that enhance practices to accommodate emerging technologies and advances in the disciplines of advertising, prospect relationship management, and other applicable categories of expertise.

C.3 REQUIREMENTS

The following are required contractor capabilities and/or components of the Navy advertising and marketing program.

1. Research, Strategic Planning, Program Development, and Assessment.

Navy's program follows an annual cycle involving market research, planning development, execution and assessment. The contractor shall be capable of organizing, managing and executing these steps. The contractor shall have a strong account management team to adequately manage the day-to-day as well as longer term projects and planning, handle mid-course adjustments required by budget and/or recruiting goal changes, and provide rapid response to the frequent demands by Navy for assessments, briefings and alternate options/proposals for consumption by various levels and organizations of Navy management. The contractor shall organize and execute research, account planning, and account management in accordance with its own highest standards of performance and with industry best practices.

a. Research – Research shall be an integral part of the Navy's annual communications plan. The contractor shall propose advertising and marketing research it deems appropriate and necessary to ensure the successful execution of the Strategic Plan and the achievement of the Navy's recruiting objectives. The contractor shall be able to devise and conduct research by itself or through subcontractors in support of the Navy Strategic Communication Plan. Industry standards and current practices in the Navy program suggest that this research should, at a minimum:

(1). Address, test, and/or support the determination of strategic effectiveness of creative strategy and copy testing (pre and post), and media selection.

(2). Employ state-of-the-art methods in research; audience identification and market segmentation; media planning and buying; post analysis; and reporting.

(3). Conduct state-of-the-art methods of formal research to include focus groups and copy testing. Methodologies shall involve both quantitative and qualitative approaches.

(4). Utilize the findings of secondary market research such as the "Youth Polling Study" and the "Ad Tracking Study" conducted by the Navy Recruiting Command and JAMRS respectively. These studies provide additional advertising and marketing measures (i.e., reasons for joining the military, awareness and influence of advertising on decisions to join, etc.) for the target market or those who have already joined the Navy.

(5). The Navy encourages the contractor to draw on its collective expertise and experience in suggesting and implementing additional research and related innovative programs required to ensure the success of the Navy's recruiting mission, the execution of the annual Strategic Plan, and the resourceful application of mid-course corrections as necessary.

(6). The contractor shall provide to the Defense Human Resources Agency (DHRA) all requested information including, but not limited, national leads,

national advertising expenditures by media and impression, and direct mail data.

b. Strategic planning – Minimum requirements:

(1). Strategic Communications Plan. The contractor shall develop and propose to Navy a long term Strategic Communications Plan for Navy approval, outlining strategic level communications and marketing goals for the following 3 years (at a minimum). This plan is developed/revised annually in late spring. For the first year of this contract the initial strategic plan will be required 30 days after contract award with the first revision to take place in Spring 2006.

(2). Advertising and Marketing Plan. Annually, the contractor must develop a one-year Navy Recruiting Advertising and Marketing Plan for the following FY for Navy approval that achieves the strategic goals for that year, meets Navy's recruiting goals set for that FY, and any special goals or needs the Navy may specify. This plan will be developed as follows:

(a).Contractor shall utilize the Strategic Communications Plan described in paragraph b. (1), Navy recruiting goals for the next FY, and any Navy provided special requirements or needs to develop this plan for presentation and discussion with Navy. Navy will normally provide this guidance in mid-April each year.

(b).The contractor shall develop the annual plan and present it to Navy for discussion at an annual planning conference hosted by the contractor.

(3). Annual Planning Conference. The annual conference shall be held in a facility chosen by the contractor preferably at or near the contractor's facility. The facility must be able to accommodate at least fifteen (15) government employees. This conference will take place in late May and will last no more than five (5) working days. In planning the annual conference, the contractor is encouraged to draw on its full expertise and experience in joint planning and team-building for comparable engagements; and to recommend the format, location, agenda, and duration of this conference that best serves the collaborative relationship between the parties and the strategic objectives of the Navy recruiting program. The contractor is responsible for administering the conference with the advice and approval of the Navy. The conference will:

(a) Review the current year's communication plan and progress toward meeting its goals.

(b) Review relevant research conducted by the contractor and other activities (JAMRS, etc) as well as advances in industry practices and emerging technologies that may have an impact on the Navy's advertising and marketing program.

(c). Review, discuss and evaluate the agencies proposed annual plan for the next FY. The Navy requires an annual comprehensive and detailed Recruiting Advertising and Marketing Plan as the primary outcome of the conference. This plan shall address emerging tools and technologies in advertising practice and provide for their practical application where appropriate. It shall also include, but is not limited to, advertising and creative objectives and

strategies, media plans and flow charts, and specific cost elements and budget allocations. The activities detailed in the strategic plan must be executable and feasible within the constraints of the Navy's advertising budget.

(4). Following the conference. Navy shall evaluate the proposed plan and may ask for additional data or details. In any case, within 30 days, the Navy shall provide written comments/revisions needed to the plan. The contractor shall make necessary revisions within two weeks submitting a final plan along with a suitable executive summary to the Navy's Contracting Officer's Representative (COR). Navy shall then proceed to obtain approval for the final plan from Navy leadership. As part of this process, the contractor may be asked to make further presentations/explanations of the plan (a contractor briefing team may be required).

(5). The initial annual Advertising and Marketing Plan shall be presented by the contractor no later than 30 days after commencement of services concurrent with the Strategic Communications Plan. Navy shall engage the contractor in a shortened comment and discussion period followed by a revised plan being developed by the contractor. This plan shall then be presented with the assistance of the contractor to Navy leadership for approval. Due to time and budget considerations, it should be expected that, at least initially, most of the current creative materials would continue to be used through much of FY06.

c. Program Development. Following approval of the annual Advertising and Marketing Plan, the contractor shall develop detailed tactical plans to implement the media buys, new creative development,

etc. for review and approval by CNRC. Once approved, these plans shall be implemented at the start of the FY.

d. Assessment – The contractor shall provide Navy with continuous assessment of the efficiency and effectiveness of the Advertising and Marketing Plan. Assessment shall include, but not be limited to, the following:

(1). Tracking of gross leads generated, program eligible leads (PELs), conversion rate to PELs, conversion rate to contracts, cost per PEL, and cost per contract for all leads generating or direct response programs including events marketing efforts for both the active and reserve components.

(2). Tracking of appropriate awareness indicators such as those provided by JAMRS, outside sources and in house Navy/contractor research to gauge the effectiveness of Navy awareness building efforts against the various primary and secondary target audiences.

(3). Maintain a detailed accounting of program costs for the various programs of the annual plan such as national and local direct mail costs (by individual mailing as well as overall for each program – active enlisted, reserve enlisted, medical, etc.).

(4). Recommend other metrics and measures of effectiveness and return on investment deemed necessary and appropriate for approval by Navy.

(5). Be able to produce various displays (graphs, bar charts, etc.) and briefings of these assessment metrics for Navy use or brief the results as desired by Navy.

e. Additional Services – The contractor shall also provide the following additional services, subject to the provisions of the strategic plan and the needs of CNRC:

(1). The contractor shall provide continuous service, counsel, and evaluation of Navy marketing, advertising, and recruiting goals. This support should include, at a minimum, assistance in the development and execution of local marketing, advertising, merchandising and promotional activity and incentive programs conducted by, and on behalf of, the Navy. The scope, content, and objectives of these activities will be driven by the annual strategic plan or derived through mid-course evaluations of progress against overall objectives.

(2). The contractor shall conduct national, regional, and local marketing and advertising training and briefings at Navy conferences, seminars, and related events.

2. Creative Strategy, Execution, and Production.

Navy requires the contractor to perform at high levels of excellence and efficiency in the creative development and execution of advertising programs and support the goals of Navy Recruiting Command. The contractor shall develop and execute (including production) a creative approach for the Navy recruiting program that is innovative and state-of-the-art and implements the approved marketing strategies. Additionally, the creative development and execution shall effectively leverage the synergies possible through integrated engagement using parallel content "streams" such as print, electronic, digital and other media as appropriate. The contractor's program shall reflect the

contractor's best creative thought and industry best practices for integrated communication and audience engagement.

The following are baseline procedural requirements reflecting current processes in the Navy's program and are not meant to restrict the scope or originality of the contractor's approach to the Navy advertising and marketing.

a. General Stipulations. The contractor shall be fully responsible for all aspects of music rights and talent contracts, including any use of celebrity spokespersons.

(1). All creative work shall be original and shall be submitted in such form as specified by CNRC for review and approval by the Navy Recruiting Advertising approving official. The contractor shall maintain, inventory and preserve all digital content and files, films, tapes, commercials, slides, negatives, and any and all other items produced by the contractor on behalf of the Navy: No items can be destroyed or discarded without prior approval from the COR. The policy for casting of models for photo "shoots" is to use Navy personnel where possible.

(2). The new contractor shall obtain from the current contractor copies of all current Navy advertising including TV and radio commercials, print and electronic advertisements, fulfillment items, etc and maintain on file for use. The contractor shall also obtain details of the copyrights, music rights and talent contracts from the current contractor for file and continued use. It shall be assumed that all current advertising and marketing will continue to be used after award of the contract unless specifically agreed

by the Navy. Therefore the new contractor shall obtain and maintain all files, spots, rights, etc to ensure all forms of Navy communications and marketing efforts continue flawlessly from current contract to new contract.

(3). Trademark and copyrights. All campaign names, slogans, catchphrases shall be trademarked, servicemarked and/or registered copyright by the contractor and then assigned to the government to hold as necessary in accordance with Title 17 of the U.S. Code entitled "Copyright" and all implementing regulations.

(4). The contractor shall be required to coordinate various aspects of the creative design with Navy's in-house creative division including the use of the in house capabilities to design and produce printed creatives (Recruiter Assistance Devices (RADs)). Posters, signage, print ads, etc.) and develop and produce videos for fulfillment items.

b. Television and Video Content. The contractor shall maintain all film masters and master videotapes along with complete documentation concerning talent contracts, music rights, and any other information needed to determine legal issues involving network or cable broadcast, or any other use or distribution of any and all video products to any audience at any time. All raw film or video footage is the property of the U.S. Navy and shall be provided by the contractor, on request, at any time with use limited only by talent contracts.

All video products provided for recruiter use shall be in a format approved by the COR.

c. Radio. Master audiotapes of any radio commercials and/or digital audio content are to be maintained and inventoried as specified in paragraph 2.A above. Provisions concerning music rights and talent contracts are the same as specified above.

d. Newspapers. The contractor shall provide for local use and tailoring of newspaper print ads in a manner consistent with industry best practices. The contractor should review and update the ads contained in the ADPACK (listed in Attachment J-2) on an as needed basis to ensure synergy with and reflect any changes in the national advertising campaign. The contractor must devise its own mechanisms, in accordance with its own contractor processes and industry best practices, to meet the Navy's need in this regard.

e. Direct Response - Creative Materials and Templates. The contractor shall provide for efficient execution of national, regional and local mailings (LDM)/emailings and other direct engagement initiatives by the national HQ (CNRC) and field offices (NRDs) in a manner consistent with industry best practices. The contractor is responsible for creating, producing, managing and reporting on all aspects of national and local direct mail orders. Initially local direct mailings ordered by the NRDs will continue to be conducted based on current procedures and guidelines via a web-based ordering system and the Navy Leads Tracking System (NALTS) or equivalent. The contractor shall maintain and operate this system and provide an on-line guidebook to provide policy and procedures for the LDM program. The contractor is encouraged to recommend changes or alternate procedures that will enhance or improve the case and

efficiency of the Navy's direct response efforts including LDM. This historical information is provided for informational purposes only: Outgoing email – the average annual total is [redacted] Local Direct Mail – the average annual total is [redacted] National Direct Mail the average annual total is [redacted] Postage for the average annual National and Local Direct Mailing by performance period:

[redacted]

f. Internet. The contractor shall be required to host, maintain, and provide daily updates as needed to the Navy-owned web sites: www.navy.com, www.elnavy.com and www.navy.reserve.com. The contractor shall leverage current and emerging web, Internet protocol (IP), and rich media techniques and technologies for maximum effectiveness, in a manner consistent with advertising industry best practices. Electronic, internet based and interactive advertising and marketing beyond our web sites shall also be a required piece of the Navy communication plan and the contractor must be able to create and execute these aspects.

g. Collateral Materials – Print. The contractor shall be required to create digitized mechanicals in accordance with CNRC detailed specifications for submission to the Government Printing Office (GPO). This historical information is provided for informational purposes only: Print Production – the average annual total of 4 color print ads is 15: 10 for black and white print ads.

h. Public Service Announcement and Related Free-Media Outreach. At a minimum, the contractor shall support efforts in Public Service Announcements (PSA), including the completion of commercials and the maintenance of film, tapes, talent, music rights, etc., to determine legal usage.

3. Media, and Related Services.

The COR shall approve all media plans, schedules, purchase, and placement of advertising and related approaches as required under CLINs 0002/0005/0008/0011/0014. Under current practice, the contractor obtains, inventories, and maintains on file tearsheets, affidavits or other advertising industry standard proof-of-performance documents.

The following baseline requirements reflect current Navy recruiting practices in activities related to media administration and list management. They are not intended to be all-inclusive, nor are they intended to constrain the contractor's performance efficiency or its introduction of innovative approaches in its proposed program.

a. Paid Television and Radio Time. The contractor shall comply with advertising industry best practices for the placement of military service television and radio commercials. This may include submitting approved schedules to the JAMRS contracted advertising contractor for their information. The contractor shall use its best efforts to obtain the lowest commercial rate available for media placement with all media discounts and merchandising credits accruing to CNRC.

b. Paid Magazine Space. The contractor shall place ads utilizing JAMRS' Magazine Advertising Credit Systems (MACS) when evaluating, planning, and executing the placement of print advertisements.

c. Direct Response List Management. The Navy encourages the contractor to develop processes, automated systems, and standards for mail and other contact list management in accordance with industry best practices. The following are baseline requirements that have to be accommodated by the contractor:

(1). The contractor shall compile or procure lists in accordance with Navy Recruiting detailed specifications and/or utilize lists furnished by CNRC for direct mail-outs or execution through other direct response media.

(2). The contractor shall maintain and update these lists (where list procurement provisions allow) as required, incorporating list input from field sites and cleaning and "de-duping" them as required. The contractor must be able to quickly respond to no mail/no contact requests from private individuals or from government agencies/officials.

(3). The contractor shall provide copies of name lists from selected mailings to field sites for use by local Navy recruiters. The lists will be forwarded electronically or on diskettes and hard copy and arranged alphabetically and by zip code.

4. Prospect Relationship Management and Fulfillment Operations.

a. Prospect Relationship Management Support.

(1). The contractor shall be expected to operate, maintain and enhance (as necessary or required by Navy) the upgraded NALTS database system currently being fielded. No new systems shall be utilized without Navy approval. The NALTS database system provides advertising and leads tracking information and territory/zip code assignments for 31 Navy recruiting districts, 4 areas, and headquarters. NALTS tracks both local and national lead generation activity, provides lead generation analysis and tracking data, houses eligibility and fulfillment processes, and provides a means of two way communication for the transfer of information to and from the fulfillment house.

(2). The contractor shall also maintain specific national advertising and marketing information including data that provides in-depth information about individual advertising efforts, including costs, insertions, dates, designated fulfillment packages and response information. This data is used to generate specialized ad hoc reports for headquarters' managers to analyze advertising effectiveness and improve marketing strategies.

(3). The contractor shall provide role-based security access to NALTS system. This will allow the contractor and headquarters staff to run standard and special queries on an "as needed" basis.

(4). For information this upgraded NALTS system shall be a fully comprehensive and automated that, at a minimum:

(a). Permits continuous evaluation of advertising services performed under the terms of this contract and advertising performed at the field level,

with regard to effectiveness and efficiency of sales leads generating media.

(b). Permits local advertising planning, execution and evaluation.

(c). Tracks the effectiveness of sales lead follow-up and conversions of leads by field components into Navy accessions.

(d). Manages centralized list and package selection (e.g., select names from a centralized prospect list and select different components of the mailing from a menu system) and centralized mail operations in support of field offices.

(e). Permits the ability to query the system on an ad hoc basis and generate customized reports

(5). The contractor must also conduct ongoing studies and analyses of the relative effectiveness of all prospect engagement initiatives. At a minimum, the contractor must test and evaluate direct response approaches in all media in accordance with industry best practices.

(6). The contractor shall be required to perform the above functions for the active and reserve components for officer and enlisted programs. This may require additional enhancements to the up graded NALTS system.

(7). The contractor, at least initially, shall be required to interface with the CIRIMS system used by the Navy Reserve for the input, tracking, and assessment of leads and contracts.

b. The Fulfillment Program.

(1). The contractor shall manage the Fulfillment Program and enhance its operations and effectiveness in accordance with the Strategic Plan and industry best practices. These functions include providing the services necessary to conduct prompt response to inquiries coming from the target group, as well as any other responses received which represent requests for information about the Navy. The Navy receives and fulfills an estimated 300,000 – 375,000 requests from U.S. mail, the Internet, e-mail and telephone (1-800 #) sources per year.

(2). The contractor shall, at a minimum, perform the following:

(a). Furnish/mail fulfillment packages to prospects within 24 hours of contacting the Navy.

(b). Forward information on individuals who meet established criteria (age, education, etc.) simultaneously via electronic and/or print means to Navy field sites.

(c). Receive, inventory, stock, and warehouse fulfillment materials furnished by various vendors and/or the Government Printing Office (GPO).

(d). Maintain additional files on respondents (i.e., Coming of Age File, Coming of Education File, Suppression File).

(e). Process special requests to provide materials to schools, colleges, guidance counselors, parents, teachers, field offices, etc.

(3). The contractor shall audit operations at all fulfillment center(s) in accordance with industry best

practices and the explicit objectives of the Strategic Plan. Additionally, the contractor must provide marketing and management reports as necessary to ensure the smooth functioning of the advertising system and the successful execution of the Strategic Plan. The contractor is encouraged to devise a responsive report facility in keeping with industry best practices. Reporting provisions and a list of required reports are listed in Attachment J-3.

(4). A list of fulfillment-related CNRC owned property that will be made available to the contractor within 30 days after contract award is provided in Attachment J-2.

a. Operation of the Call Center.

(1). The contractor shall staff and manage either directly or by means of contracting a third party a Call Center in accordance with industry standards for such operations. The Center currently consists of equipment and personnel necessary to answer calls to the Navy's 1-800 telephone numbers, as well as other categories of incoming inquiries.

(2). Trained representatives shall be on call 24 hours a day, 365 days a year to handle incoming inquiries from prospects for both the active and reserve components. At a minimum, this operation must incorporate Interactive Voice Response (IVR). The contractor must implement and administer other screening/prospect relationship management resources as determined in the Strategic Plan. The Navy receives an estimated 200,000 telephone calls each year on its toll-free number.

(3). Ancillary support services, including but not limited to the maintenance of post office boxes, shipping of materials to the field, the preparation and shipping of periodical reports, and the storage of a large variety of items, must also be provided by the contractor.

1. Events Marketing

The contractor shall be required, at a minimum, to plan and execute comprehensive events marketing activities to encompass the following:

a. Recommend, contract and coordinate the various Navy events marketing properties. The contractor will provide a web based scheduling systems for use by Navy to request specific properties at specific events/sites and dates, display the Navy approved schedule including a map feature showing events by date/month and/or NRD and/or type of event on a map of the US. A list of events marketing services required by CNRC is provided in Attachment J-4.

b. Periodically assess the effectiveness of the various properties and events the Navy attends as well as the effectiveness of the recruiter's use of each property/event. This shall require periodic on site evaluations. The contractor shall provide the Navy with reports displaying the usage and effectiveness of properties. The contractor shall make recommendations for the improvement, enhancement or replacement of the properties to ensure properties are appealing to the intended target audience and make an impact on them and recommend changes to Navy's use/scheduled events to maximize effectiveness and ROI for their various uses including diversity events.

c. Produce and update an events marketing guidebook for use by field recruiters and PAOs for the scheduling of properties, setup guidance for maximizing usefulness and appeal of the properties, and best event marketing practices for target audiences and for influencer audiences including best positioning, personal interaction and use of promotional items/RADs.

d. Ensure that the various properties maintain consistent graphics and signage that are in keeping with the appropriate Navy communications plan and the intended audience.

e. Recommend changes to the Navy's promotional items and RADs to enhance Navy's events marketing efforts.

f. Assist in timing of recruiters in best events marketing practices at various meetings, conferences and other venues throughout the year as may be required.

6. Account Management and Team Execution.

The contractor shall have on staff an account management team in keeping with advertising industry best practices and its own most successful operating processes. The contractor shall provide high levels of account service across the full spectrum of industry-standard management activities including, but not limited to, IT support; client (Navy) interaction and comprehensive reporting; financial administration and oversight; and human capital/team management, among other possible factors.

The following are baseline functional requirements reflective of current practice in the Navy advertising program. The contractor shall accommodate these

requirements efficiently in its proposed program. They are not meant to be all-inclusive nor restrictive to the contractor's approach to Navy advertising and marketing.

a. Management and Financial Interface Requirements

(1). Performance of work shall be subject to approaches outlined in the Strategic Plan and to input provided by CNRC. CNRC will provide the contractor desired completion dates and possible lines of inquiry. This input shall otherwise complement the general scope of the contract and support the implementation of the Strategic Communications Plan and annual Advertising and Marketing Plan.

(2). The contractor must maintain adequate liaison with cognizant personnel within CNRC to ensure the successful execution of the plans. Conference reports shall be submitted to the COR within 3 working days after all major meetings/ conferences. At a minimum, the contractor shall conduct a weekly conference call with the COR and other key CNRC personnel to update key projects, discuss upcoming milestones and resolve pressing issues. Quarterly videoconferences and periodic site visits by the contractor to CNRC or vice versa shall be required.

(3). The contactor shall prepare, update, and present various data necessary to the management/financial review of the contract in addition to reporting requirements specified elsewhere in this section as follows:

(a). An allocation/expenditure report by project is required. The contractor shall maintain a

system that accounts for all costs (labor as well as other direct expenses) for all projects, such as production of advertising, direct mail, etc. This shall be kept on a project basis and a monthly report detailing all project costs be provided to CNRC Financial Manager.

(b). Various reports (i.e., DD 804, OMB Exhibit 300) are required to be furnished by the contractor to the CNRC Financial Manager. The reports and their frequencies are listed in Attachment J-3.

(4). The contractor shall provide other financial and management data and related ad hoc reports to CNRC when requested.

b. Human Capital and Capabilities.

(1) The contractor is responsible for configuring and managing its team in the implementation of the Navy recruiting effort. The contractor shall designate one main point of contact for all issues related to performance of this contract and identify other critical personnel/points of contact for this requirement.

(2) The contractor's current clients shall not represent a conflict of interest with the Navy account/brand.

(3) During the year, Navy has projects of all types in preparation and/or operation and various plans and strategies in various stages of development or refinement. These projects can range from creation and production of a single print advertisement to planning and executing an on-line communications campaign. The contractor shall maintain an adequate, experienced staff to handle these routine requirements

on a day-to-day basis as well as handle the multitude of rapid response briefs, budget evaluations, and new/modified requirements.

7. Additional Information

a. For Contract Line Item Numbers (CLINs) 0003/0006/0009/0012/0015. Additional Advertising Services are for emergent services not covered by the Strategic Plan, but considered to be within scope of the overall contract. These CLINs will be awarded on a task order basis, if and when the Navy has a requirement for emergent, unplanned services not covered by the Strategic Plan. There is no guarantee that this CLIN will be utilized. However, if it is, the contractor will receive a statement of work from the Ordering Officer/Contracting Officer requesting a proposal. The contractor will propose the number of hours, the labor segment mix (from the 6 labor segments) and ODC's. After negotiation of the hours and ODC's, a firm fixed-price task order will be issued based on the pre-determined hourly rates proposed for this CLIN.

b. A glossary of terms used in this statement of work is provided in Attachment J-5.

REQUIRED STANDARD OF WORKMANSHIP (FISC DET PHILA)(OCT 1992)

Unless otherwise specifically provided in this contract, the quality of all services rendered hereunder shall conform to the highest standards in the relevant profession trade or field of endeavor. All services shall be rendered by or supervised directly by individuals fully qualified in the relevant profession, trade or field, and holding any licenses required by law.

EMPLOYMENT OF DEPARTMENT OF DEFENSE PERSONNEL RESTRICTED

In performing this contract, the contractor will not use as a consultant or employ (on either a full or part time basis) any current Department of Defense (DoD) personnel (civilian or military) without the prior approval of the Contracting Officer. Such approval may be given only in circumstances where it is clear that no laws and no DoD or Navy instructions, regulations, or policies might possibly be contravened and no appearance of a conflict of interest will result.

DURATION OF CONTRACT PERIOD (FISC DET PHILA) (OCT 1992)

(a) The ordering period shall continue in effect during the period ending * months after date of award. The performance period shall continue in effect during the period ending ** months after date of contract.

*

**

TIME OF PERFORMANCE (FISC DET PHILA) (OCT 1992)

Services to be furnished hereunder shall be performed and completed with the following Schedule of Services, as delineated within page 2 through 9 of the solicitation:

COMMUNICATIONS

(a) Except as specified in paragraph (b) below, no order, statement, or conduct of Government personnel who visit the Contractor's facilities or in any other

manner communicates with Contractor personnel during the performance of this contract shall constitute a change under the "Changes" provision of FAR clause 52.212-4 "Contract Terms and Conditions – Commercial Items (Oct 2003)" of this contract.

(b) The Contractor shall not comply with any order, direction or request of Government personnel unless it is issued in writing and signed by the Contracting Officer, or is pursuant to specific authority otherwise included as a part of this contract.

(c) The Contracting Officer is the only person authorized to approve changes in any of the requirements of this contract and, notwithstanding provisions contained elsewhere in this contract, the said authority remains solely the Contracting Officer's. In the event the contractor effects any change at the direction of any person other than the Contracting Officer, the change will be considered to have been made without authority and no adjustment will be made in the contract price to cover any increase in charges incurred as a result thereof. The address and telephone number of the Principal Contracting Officer is:

Brian Excell
FISC Norfolk Contracts Department Philadelphia Division
700 Robbins Ave., Bldg. 2B
Philadelphia, PA. 19111-5083
Phone (215) 697-9610

SUBCONTRACTING WITH FIRMS THAT ARE OWNED OR CONTROLLED BY THE GOVERNMENT OF A TERRORIST COUNTRY (252.209-7004) (MAR 1998)

(a) Unless the Government determines that there is a compelling reason to do so, the Contractor shall not enter into any subcontract in excess of [redacted] with a firm, or a subsidiary of a firm, that is identified, on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs, as being ineligible for the award of Defense contracts or subcontracts because it is owned or controlled by the government of a terrorist country.

(b) A corporate officer or a designee of the Contractor shall notify the Contracting Officer, in writing, before entering into a subcontract with a party that is identified, on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs, as being ineligible for the award of Defense contracts or subcontracts because it is owned or controlled by the government of a terrorist country. The notice must include the name of the proposed subcontractor and the compelling reason(s) for doing business with the subcontractor notwithstanding its inclusion on the List of Parties Excluded From Federal Procurement and Nonprocurement Programs.

FISC POINT OF CONTACT

The point of contact at the contracting office regarding this solicitation/contract is Frank Moretti, Code 204.12A, who can be reached at phone (215) 697-9611 or by email at frank.moretti@navy.mil.

SUBCONTRACTING WITH FIRMS THAT ARE OWNED OR CONTROLLED BY THE GOVERNMENT OF A TERRORIST COUNTRY (252.209-7004) (MAR 1998)

(a) Unless the Government determines that there is a compelling reason to do so, the Contractor shall not enter into any subcontract in excess of [redacted] with a firm, or a subsidiary of a firm, that is identified, on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs, as being ineligible for the award of Defense contracts or subcontracts because it is owned or controlled by the government of a terrorist country.

(b) A corporate officer or a designee of the Contractor shall notify the Contracting Officer, in writing, before entering into a subcontract with a party that is identified, on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs, as being ineligible for the award of Defense contracts or subcontracts because it is owned or controlled by the government of a terrorist country. The notice must include the name of the proposed subcontractor and the compelling reason(s) for doing business with the subcontractor notwithstanding its inclusion on the List of Parties Excluded From Federal Procurement and Nonprocurement Programs.

SMALL BUSINESS SUBCONTRACTING PLAN

The target for offerors' Small Business Subcontracting Plan for this requirement is 12% of the total planned subcontracting dollars. See FAR Clause 52.219-9 for further details.

INVOICE INSTRUCTIONS

1. Invoices submitted for Advertising Services under CLINs 0001, 0004, 0007, 0010, 0013 shall be submitted at the end of each month for the monthly amount specified in the pricing schedule.

2. Invoices submitted for Space Charges and Media Placement under CLINs 0002, 0005, 0008, 0011, 0014 shall be billed at the actual market price less rebates and submitted at the end of the month in which the expenses were incurred.

3. Task orders for Additional Advertising Services placed under CLINs 0003, 0006, 0009, 0012, 0015 utilizing the Fixed Rate Segment Hours and Other Direct Expenses shall be billed as follows:

a. Task orders with a performance period of 90 days or less shall be billed only after all work has been completed.

b. For any task order with a performance period exceeding 90 days, the Government and the contractor may establish a billing arrangement prior to the award of the order. Any such billing arrangement will reflect either (1) monthly amounts equal to the services and/or supplies rendered during each month, or (2) an equal amount prorated each month over the course of the performance period.

c. When no pre-arranged method of billing is specified in a task order, payment shall be made upon the completion of the services/supplies in the order.

d. Invoices for these task orders shall only be submitted at the end of the month unless

otherwise approved by the Contracting/Ordering Officer on a case-by-case basis.

4. The contractor shall submit completed invoices for all CLINs, including backup documentation for space charges and media placement (CLINs 0002, 0005, 0008, 0011, 0014) and for additional advertising services (CLINs 0003, 0006, 0009, 0012, 0015) to Navy Recruiting Command, 5722 Integrity Drive, Building 784, Millington, TN 38054, Attn: Advertising and Marketing Department, N9.

MINIMUM AND MAXIMUM QUANTITIES (FISC DET PHILA) (OCT 1992)

As referred to in paragraph (b) of the "Indefinite Quantities" clause of this contract, the total contract minimum quantity is a total of [redacted] worth of orders at the contract unit price(s). The contract maximum quantity is a total of the total estimated amount of the contract.

ORAL ORDERS (INDEFINITE DELIVERY CONTRACTS) (NAVSUP 5252.216-9402) (JAN 1999)

(a) Oral orders may be placed provided the following conditions are complied with:

(1) No oral order will exceed [redacted] or such lesser amount as may be specified elsewhere in the schedule of this contract.

(2) The Contractor will furnish with each shipment a delivery ticket, in triplicate, showing: contract number, order number under the contract, date order was placed, name and title of person placing order, an itemized listing of supplies or services

furnished, unit price and extension of each item, and delivery or performance date.

(3) Invoices for supplies or services furnished in response to oral orders will be accompanied with a received copy of each related delivery ticket.

(4) The ordering activity shall designate in writing the names of individuals authorized to place oral orders and will furnish a copy thereof to the Contractor.

(5) Written confirmation of oral orders will be issued as a means of documenting the oral order within ten (10) working days or oral orders will be confirmed twice a month, in writing, when more than one (1) oral order is consolidated for a single confirmation.

APPOINTMENT OF CONTRACTING OFFICER'S REPRESENTATIVE (FISC DET PHILA) (OCT 1992)

(a) The Contracting Officer hereby designates the following individual as Contracting Officer's Representative(s) (COR) for this contract:

____TO BE DETERMINED_____

NAME CODE

_____

MAIL ADDRESS

_____

TELEPHONE NUMBER

(b) In the absence of the COR named above, all responsibilities and functions assigned to the COR shall be the responsibility of the alternate COR acting on

behalf of the COR. The Contracting Officer hereby appoints the following individual as the alternate COR:

____John Bird_____N9B
NAME CODE

Navy Recruiting Command, 5722 Integrity Drive, Bldg. 784, Millington, TN 38053
MAIL ADDRESS

901-874-9423_____
TELEPHONE NUMBER

(c) The COR will act as the Contracting Officer's representative for technical matters, providing technical direction and discussion as necessary with respect to the specification or statement of work, and monitoring the progress and quality of contractor performance. The COR is not an Administrative Contracting Officer and does not have authority to take any action, either directly or indirectly, that would change the pricing, quantity, quality, place of performance, delivery schedule, or any other terms and conditions of the contract (or delivery/task order), or to direct the accomplishment of effort which goes beyond the scope of the statement of work in the contract (or delivery/task order).

(d) It is emphasized that only a Contracting officer has the authority to modify the terms of the contract, therefore, in no event will any understanding, agreement, modification, change order, or other matter deviating from the terms of the basic contract between the contractor and any other person be effective or binding on the Government. When/if, in the opinion of the contractor, an effort outside the existing scope of the contract (or delivery/task order) is requested, the

contractor shall promptly notify the PCO in writing. No action shall be taken by the contractor under such direction unless the PCO or ACO has issued a contractual change or otherwise resolved the issue.

WRITTEN ORDERS (INDEFINITE DELIVERY CONTRACTS)(NAVSUP 5252.216-9403) (JAN 1992)

Written order (on SF 1449) will contain the following information consistent with the terms of the contract:

(a) Date of order.

(b) Contract number and order number.

(c) Item number and description, quantity ordered, unit price and contract price.

(d) Delivery or performance date.

(e) Place of delivery or performing (including consignee).

(f) Packaging, packing, and shipping instructions, if required.

(g) Accounting and appropriation data.

(h) Any other pertinent information.

ORDERING OFFICE

The Ordering Offices for this contract shall be as follows:

Task orders valued up to $5M: Navy Recruiting Command, Millington, TN

Task orders valued over $5M: FISC Norfolk, Contracting Department, Philadelphia Division.

CONTRACT ADMINISTRATION PLAN (CAP) FOR FIXED PRICE CONTRACTS

In order to expedite the administration of this contract, the following delineation of duties is provided. The names, addresses and phone numbers for these offices or individuals are included elsewhere in the contract award document. The office or individual designated as having responsibility should be contacted for any questions, clarifications, or information regarding the administration function assigned.

1. The Procuring Contract Office (PCO) is responsible for:

   a. All pre-award duties such as solicitation, negotiation and award of contracts.

   b. Any information or questions during the pre-award stage of the procurement.

   c. Freedom of information inquiries.

   d. Changes in contract terms and/or conditions.

   e. Post award conference.

2. The Contract Administration Office (CAO) is responsible for matters specified in the FAR 42.302 and DFARS 42.302 except those areas otherwise designated as the responsibility of the Contracting Officer's Representative (COR) or someone else herein.

3. The paying office is responsible for making payment of proper invoices after acceptance is documented.

4. The Contracting Officer's Representative (COR) is responsible for interface with the contractor and performance of duties such as those set forth below. It is emphasized that only the PCO/CAO has the

authority to modify the terms of the contract. In no event will any understanding, agreement, modification, change order, or other matter deviating from the terms of the basic contract between the contractor and any other person be effective or binding on the Government. If in the opinion of the contractor an effort outside the scope of the contract is requested, the contractor shall promptly notify the PCO in writing. No action may be taken by the contractor unless the PCO or CAO has issued a contractual change. The COR duties are as follows:

a. Technical Interface

(1) The COR is responsible for all Government technical interface concerning the contractor and furnishing technical instructions to the contractor. These instructions may include: technical advice/recommendations/clarifications of specific details relating to technical aspects of contract requirements; milestones to be met within the general terms of the contract or specific subtasks of the contract; or, any other interface of a technical nature necessary for the contractor to perform work specified in the contract or order. The COR is the point of contact through whom the contractor can relay questions and problems of a technical nature to the PCO.

(2) The COR is prohibited from issuing any instruction which would constitute a contractual change. The COR shall not instruct the contractor how to perform. If there is any doubt whether technical instructions contemplated fall within the scope of work, contact the PCO for guidance before transmitting the instructions to the contractor.

b. Contract Surveillance

(1) The COR shall monitor the contractor's performance and progress under the contract. In performing contract surveillance duties, the COR should exercise extreme care to ensure that he/she does not cross the line of personal services. The COR must be able to distinguish between surveillance (which is proper and necessary) and supervision (which is not permitted). Surveillance becomes supervision when you go beyond enforcing the terms of the contract. If the contractor is directed to perform the contract services in a specific manner, the line is being crossed. In such a situation, the COR's actions would be equivalent to using the contractor's personnel as if they were government employees and would constitute transforming the contract into one for personal services.

(2) The COR shall monitor contractor performance to see that inefficient or wasteful methods are not being used. If such practices are observed, the COR is responsible for taking reasonable and timely action to alert the contractor and the PCO to the situation.

(3) The COR will take timely action to alert the PCO to any potential performance problems. If performance schedule slippage is detected, the COR should determine the factors causing the delay and report them to the PCO, along with the contractor's proposed actions to eliminate or overcome these factors and recover the slippage. Once a recovery plan has been put in place, the COR is responsible for monitoring the recovery and keeping the PCO advised of progress.

c. Invoice Review and Approval/Inspection and Acceptance

(1) The COR is responsible for quality assurance of services performed and acceptance of the services or deliverables. The COR shall expeditiously review copies of the contractor's invoices or vouchers, certificate of performance and all other supporting documentation to determine the reasonableness of the billing. In making this determination, the COR must take into consideration all documentary information available and any information developed from personal observations.

(2) The COR must indicate either complete or partial concurrence with the contractor's invoice/voucher by executing the applicable certificate of performance furnished by the contractor. The COR must be cognizant of the invoicing procedures and prompt payment due dates detailed elsewhere in the contract.

(3) The COR will provide the PCO and the CAO with copies of acceptance documents such as Certificates of Performance.

d. Contract Modifications. The COR is responsible for developing the statement of work for change orders or modifications and for preparing an independent government cost estimate of the effort described in the proposed statement of work.

e. Administrative Duties

(1) The COR shall take appropriate action on technical correspondence pertaining to the contract and for maintaining files on each contract. This includes all modifications, government cost estimates,

contractor invoices/vouchers, certificates of performance, DD 250 forms and contractor's status reports.

(2) The COR shall maintain files on all correspondence relating to contractor performance, whether satisfactory or unsatisfactory, and on trip reports for all government personnel visiting the contractor's place of business for the purpose of discussing the contract.

(3) The COR must take prompt action to provide the PCO with any contractor or technical code request for change, deviation or waiver, along with any supporting analysis or other required documentation.

f. Government Furnished Property. When government property is to be furnished to the contractor, the COR will take the necessary steps to insure that it is furnished in a timely fashion and in proper condition for use. The COR will maintain adequate records to ensure that property furnished is returned and/or that material has been consumed in the performance of work.

g. Security. The COR is responsible for ensuring that any applicable security requirements arc strictly adhered to.

h. Standards of Conduct. The COR is responsible for reading and complying with all applicable contractor standards of conduct and conflict of interest instructions.

i. Written Report/Contract Completion Statement.

(1) The COR is responsible for timely preparation and submission to the PCO, of a written,

annual evaluation of the contractors performance. The report shall be submitted within 30 days prior to the exercise of any contract option and 60 days after contract completion. The report shall include a written statement as to the use made of any deliverables furnished by the contractor. If the Contractor Performance Assessment Reporting System (CPARS) is applicable to the contract you are responsible for completing a Contractor Performance Assessment Report (CPAR) in the CPARS Automated Information System (AIS). The initial CPAR, under an eligible contract, must reflect evaluation of at least 180 days of contractor performance. The completed CPAR, including contractor comments if any, (NOTE: contractors are allowed 30 days to input their comments) should be available in the CPARS AIS for reviewing official (PCO) review no later than 270 days after start of contract performance. Subsequent CPARs covering any contract option periods should be ready at 1-year intervals thereafter.

(2) For contracts where delivery orders arc issued, one consolidated report which addresses all actions under the contract may be submitted.

5. The Technical Assistant (TA), if appointed, is responsible for providing routine administration and monitoring assistance to the COR. The TA does not have the authority to provide any technical direction or clarification to the contract. Duties that may be performed by the TA are as follows:

a. Identify contractor deficiencies to the COR.

b. Review contract/delivery order deliverables, recommend acceptance/rejection, and provide the COR with documentation to support the recommendation.

c. Assist in preparing the final report on contractor performance for the applicable contract/delivery order in accordance with the format and procedures prescribed by the COR.

d. Identify contract noncompliance with reporting requirements to the COR.

e. Evaluate the contractor's proposals for specific delivery orders and identify, for the COR, any potential problems, areas of concern, or issues to be discussed during negotiations.

f. Review contractor status and progress reports, identify deficiencies to the COR, and provide the COR with recommendations regarding acceptance, rejection, and/or Government technical clarification requests.

g. Review invoices for the appropriate mix of types and quantities of labor, materials, and other direct costs, and provide the COR with recommendations to facilitate COR certification of the invoice.

h. Provide the COR with timely input regarding technical clarifications for the statement of work, possible technical direction to provide the contractor, and recommend corrective actions.

i. Provide detailed written reports of any trip, meeting, or conversation to the COR subsequent to any interface between the TA and contractor.

CLAUSES AND PROVISIONS INDEFINITE DELIVERY

Clause No.	Title
52.216-18	Ordering (OCT 1995) (a) issued from _*_ through_**_ * Date of Award ** 12 months thereafter; 60 months if all options are exercised.
52.216-19	Order Limitations (OCT 1995) (a) less than _[redacted]_ (b)(1) in excess of _the total estimated amount of the contract_ (b)(2) in excess of _the total estimated amount of the contract_ (b)(3) within _10_ days (d) within _7_ days
52.216-22	Indefinite Quantity (OCT 1995) (d) _66 months_
52.217-9	Option to Extend the Term of the Contract (MAR 2000) (a) prior to contract expiration (b) at least _0_ days (c) not exceed _60_ months

OFFEROR REPRESENTATIONS AND CERTIFICATIONS–COMMERCIAL ITEMS (FAR 52.212-3) (APR 2002) ALTERNATE 1 (APR 2002) Incorporated By Reference

The following provisions are hereby incorporated by reference:

Provision No.	Title
52.215-1	Instructions to Offerors Competitive Acquisition (JAN 2004)
52.215-3	Request for Information or Solicitation for Planning Purposes (OCT 1997)
52.222-46	Evaluation of Compensation for Professional Employees (FEB 1993)
52.232-38	Submission of Electronic Funds Transfer Information With Offer (MAY 1999)

SERVICE OF PROTEST (FAR 52.233-2) (AUG 1996)

(a) Protests, as defined in Section 33.101 of the Federal Acquisition Regulation, that are filed directly with an agency, and copies of any protests that are filed with the Government Accountability Office (GAO), shall be served on the Contracting Officer (addressed as follows) by obtaining written and dated acknowledgment of receipt from

FISC Norfolk, Contracting Department Philadelphia Division,
700 Robbins Avenue, Bldg. 2B
Philadelphia, PA 19111-5083
Brian Excell, Code 204.12
(215) 697-9610

(b) The copy of any protest shall be received in the office designated above within one day of filing a protest with the GAO.

SOLICITATION PROVISIONS INCORPORATED BY REFERENCE (FAR 52.252-1) (FEB 1998)

This solicitation incorporates one or more solicitation provisions by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. The offeror is cautioned that the listed provisions may include blocks that must be completed by the offeror and submitted with its quotation or offer. In lieu of submitting the full text of those provisions the offeror may identify the provision by paragraph identifier and provide the appropriate information with its quotation or offer. Also, the full text of a solicitation provision may be accessed electronically at this/these address(es):

http://www.arnet.gov.far/ FAR
http://www.acq.osd.mil/dp/dars/dfars/ DFARS
http://farsite.hill.af.mil/ FAR/DFAR

TYPE OF CONTRACT (FAR 52.216-1) (APR 1984)

The Government contemplates award of an Indefinite Delivery/Indefinite Quantity, Firm Fixed Price type contract resulting from this solicitation.

SUBMISSION OF PROPOSALS (BEST VALUE) (ORAL PRESENTATIONS) (FISC NORFOLK DET PHILA) (MAR 2000) Incorporated By Reference

EVALUATION CRITERIA AND THE BASIS FOR AWARD (FISC NORFOLK DET PHILA) (MAR 2000)

Incorporated By Reference

SECTION J- ATTACHMENTS

ATTACHMENT J-1 RECRUITING GOALS FOR FY05 AND FY06

ATTACHMENT J-2 - GOVERNMENT FURNISHED ITEMS

ATTACHMENT J-3 - REQUIRED REPORTS

ATTACHMENT J-4- EVENTS MARKETING SERVICES

ATTACHMENT J-5 - GLOSSARY OF TERMS

Attachment J-1

CNRC RECRUITING GOALS FOR FY2005 AND FY2006

(ACTIVE DUTY GOALS)

ACTIVE DUTY – GENERAL ENLISTED ACCESSION PLAN

		FY05	FY06
	Description	Goals	Goals
	General Enlisted	36,665 Contracts	35,000 Accessions

(ACTIVE DUTY OFFICERS)

FY05 OFFICER DESIGNATOR ACCESSION PLAN

		FY05	FY06
Designator	Description	Goals	Goals
	OCS Programs		
1165	Surface (Conventional)	18	43
1165	Surface (Nuclear)	32	32
1175	Submarine (NUPOC)	107	93
1185	Special Warfare	10	
1195	Special Operations	2	
1375	Naval Flight Officer	81	60
1395	Pilot	106	40
1525	Aviation Main Duty Officer	23	2
1645	Cryptology	15	14

1635	Intelligence	53	7
1635	Public Affairs	1	1
3105	Supply Corps	129	133
5105	Civil Engineer Officer	68	66
	Direct Procurement		
1205NI	Nuclear Instructor	26	26
1205NR	Naval Reactors Engineer	8	6
2105	Medical Corps (MC)	15	10
	Direct Procurement - 10		
	Reserve Recall - 5		
2205	Dental Corps (DC)	15	60
	Direct Procurement -10		
	Reserve Recall - 5		
2305	Medical Services Corps	70	77
	Reserve Recall - 0		
2905	Nurse Corps (NC)	99	113
	Direct Procurement - 84		
	Reserve Recall - 15		
2505	JAG Corps	7	3
4105	Chaplin (CHC)	40	45

Note: Assumes FY06 Goals are the same as FY05 Goals unless otherwise noted.

ACTIVE DUTY OFFICERS (CONTINUED)

		FY05	FY06
Designator	Description	Goals	Goals
	Student Designator (19XX)		
1925	DC	5	10
1945	CHC	40	40
1955	JAGC		45
	FY-06 (Grad Law School '05)	21	
	FY-07 (Grad Law School '06)	26	
1975	HPSP MC (Note 1)	295	300
1985	HPSP DC (Note 1)	85	70
1995	HPSP MSC (Optometry) Note 1	9	6
	Other Student/Aid Programs		
	Financial Assistance Programs (FAP)		
2105	Medical Corps (Note 1)	20	28
2205	Dental Corps (Note 1)	6	6
NCP	Nurse Candidate Program (NCP) (Note 1)	55	55
HSCP	MSC (Note 1)	40	40

HSCP	DC (Note 1)	30	38
Note 1	Breakout of Medical		
	program goals will be		
	provided to CNRC by		
	cognizant Officer		
	Community Managers		
	SEPCOR.		

RESERVE GOALS

RESERVE - GENERAL ENLISTED ACCESSION PLAN

		FY05	FY06
	Description	Target	Target
	General Enlisted Reserve	13,491 Accessions	9,000 Accessions

RESERVE OFFICERS
FY05 OFFICER DESIGNATOR ACCESSION PLAN

		DCO	Vet	Total
Designator		Target	Target	Target
1105*				13
1115**				254
1125**				69
1135				20
1145				10
13055				5

1315**				315
1325**				53
14x5		15	15	30
1515		15	15	30
1525		5	5	10
1605				10
1615		20	10	30
1625/1675**		5	20	25
1635		100	80	180
1655		5	5	10
1805		5	5	10
2105				85
2205				18
2305				20
2505				40
2905				80
3105		35	65	100
4105		10	30	40
5105		32	72	104
LDO/CWO				104
Total				1667

*May fill 1000 coded billets

**May fill 1000 and 1050 coded billets

RESERVE OFFICER GOALS (CONTINUED)

**RESERVE OFFICER - MEDICAL CORPS (2105)

SSP	AQD	Description	Target
15AO		Aviation Medicine	4
15BO		Anesthesia, General	10
1581		Anesthesia, Subspecialty	3
15CO		Surgery General	10
15C1		Surgery, Subspecialty	
	6CD	Thoracic/Cardiovascular Surgeon	1
	6CE	Colon Rectal Surgeon	3
	6CI	Peripheral Vascular Surgery	2
	6CJ	Plastic Surgery	1
	6CM	Trauma Surgery	2
	62C	Critical Care Surgeon	2
15DO		Neurological Surgery, General	3
15EO		Obstetrics/Gynecology, General	1
15FO		General Medicine	2
15GO		Ophthalmology, General	2
15HO		Orthopedic Surgery, General	2
15H1		Orthopedic Surgery, Subspecialty	5
15IO		Otolaryngology	2
15JO		Urology	1
15KO		Preventive Medicine, General	1

15MO		Pathology, General	1
16NO		Dermatology, General	1
16PO		Emergency Medicine, General	4
16OO		Family Practice, General	1
16R1		Internal Medicine, General	1
	6RG	Cardiovascular Internist	3
	6RL	Gastroenterology	1
	6RP	Infectious Disease	1
	6RQ	Nephrology	1
	6RR	Pulmonology	3
	62C	Critical Care Internist	4
16TO		Neurology, General	1
16XO		Psychiatry, General	4
16YO		Diagnostic Radiology	2
TOTAL			85

**Dental Corps (2205

SSP	AOD	Description	Target
1700		General Dentist	10
1750		Oral Maxillofacial Surgeon	8
Total			18

Accessions are for Lieutenant Commanders and below only. All others are a case by case and must have N16 approval.

RESERVE OFFICER GOALS (CONTINUED)

FY05 Accession Plan For Health Care Designators by Specialty

**Medical Service Corps (2305)

SSP	Description	Target
1801	Patient Administrator	2
1802	Medical Logistics	3
1836	Physiologist	1
1841	Child Psychology	1
1842	Neuropsychology	1
1843	Medical Psychology	1
1861	Industrial Hygiene	2
1865	Medical Technology	2
1887	General Pharmacy	1
1892	Podiatry	1
3130	Manpower	2
3121	Medical Logistician	1
6201	Info Systems	2
Total		20

**Nurse Corps (2905)

SSP	Description	Target
1900	Professional Nurse	34
1910	Medical Surgical Nursing	10
1920	Maternal/Infant Health Nursing	2
1930	Psychiatric Nursing	4
1950	Perioperative Nursing	20
1960	Critical Care Nursing	10
1972	Anesthesia	2

Total		82

**Accessions are for Lieutenant Commanders and below only

RESERVE OFFICER GOALS (CONTINUED)

FY05 QUOTAS FOR HEALTH CARE PROFESSIONAL SPECIALTIES WITH CRITICAL WARTIME SHORTAGES

The following critically short health care specialties are currently manned at less than optimal levels as determined by COMNAVRESFORCOM N16. They are eligible to apply for Special Pay, Stipend and/or Loan Repayment Program(s) (LRP). Applicants must be Board eligible or Board certified in a specialty for Special Pay (Note: The surgical subspecialty of Thoracic/Cardiovascular Surgery is eligible only after a minimum five year residency in General Surgery.

Medical Service Corps (2105

SSP	AQD	Description	Target
15BO		Anesthesia, General	10
15CO		Surgery, General	10
15C1		Surgery, Subspecialty	
	6CD	Thoracic/Cardiovascular Surgeon	1
	6CE	Colon Rectal Surgeon	3
	6CI	Peripheral Vascular Surgery	2
	6CJ	Plastic Surgery	1
	6CM	Trauma Surgery	2
15DM		Neurological Surgery, General	3

15H1		Orthopedic Surgery, Subspecialty	5
15JO		Urologist	1
16R1		Internal Medicine Subspecialty	
	6RG	Cardiovascular Internist	3
	6RL	Gastroenterology	1
	6RP	Infectious Disease	1
	6RO	Nephrology	1
	6RR	Pulmonology	3
TOTALS			47

**Dental Corps (2205)

SSP	Description	Target
1750	Oral Surgery	10
TOTAL		10

**Nurse Corps (2905)

SSP	Description	Target
1900	Professional Nursing	34
1910	Medical Surgical Nurse	10
1950	Periooperative Nursing	10
1960	Critical Care Nursing	10
TOTAL		64

*Subspecialties 15Cl and 16Rl are AQD specific

**Accessions are for Lieutenant Commanders and below only. All others are case by case and must have N16 approval.

ATTACHMENT J-2
GOVERNMENT FURNISHED ITEMS

1. Navy Advertising Leads Tracking System (NALTS) Database:

   The advertising management and leads tracking database and information system consists of five interrelated parts: field and national leads tracking information, field and national advertising planning and execution tracking information, field site territory and zip code assignments, eligibility and fulfillment processing.

2. Zip Code/NRS Territory Maintenance Table (within NALTS)

3. Physical Inventory for Fulfillment Operations

   a. Information Booklets (e.g., Accelerate Your Life (AYL) Brochure and equivalent booklets for other programs)

   b. NOIC Stationery Envelopes, letterhead, etc.

   c. Prospect Cards

   d. Premiums (e.g., posters, patches, CDs)

   e. Electronic copies of prior year reports

4. Documentation

   a. Operations "standard operating procedures" (SOPs)

   b. System Design Documentation

   c. Program Code

   d. User Guides to Operating Systems

   e. Eligibility and Fulfillment Processing

5. ADPACK Catalog - includes approximately 100-200 small classified ads and 25-30 display ads ranging in size from 1/8 to 1/2 page ads. Photography used in these ads is black and white

6. Digital Inventory of Creative Executions.

ATTACHMENT J-3
REQUIRED REPORTS

1. Financial Reports Required – Submitted to CNRC N9C, Budget/Contracting:

   a. Form DD804 – Recruiting Resources Summary Report - (monthly)

   b. Office of Management and Budget (OMB) Exhibit 300 – (relating to www.navy.com) (frequent data calls)

   c. Allocation/Expenditure Report by Project (Labor and Other Direct Costs) – (monthly)

   d. Budget Planning Report (submitted with Annual Advertising & Marketing Plan (Proposed Plan for Labor and Other Direct Costs) – (yearly at Planning Conference)

   e. Ad hoc financial data/reports – (when requested)

2. Management Reports Required – Submitted to CNRC N9, COR:

   a. Project Status Report (weekly)

   b. Ad hoc queries and reports – (when requested)

3. Leads Management Reports – Submitted to CNRC N912

   a. Standard NALTS Generated Reports:

(1). Analytical Reports

(a). Feedback Analysis

(b). Feedback Analysis Region Summary

(c). Feedback Analysis CNRC Summary

(d). Lead Production

(e). Waterfall Report

(f). Local Leads Analysis

(g). Monthly Status Summary

(h). Newspaper Tracking

(i). Direct Mail Tracking

(j). Other Media Tracking

(2). Operational Reports

(a). List of Leads

(b). Summary List of Accessions

(c). Upcoming Overdue Leads

(d). Daily Counts

(e). Master Ad Plan

(f). Detail Ad Plan

(g). Newspaper Ad Plan

(h). Direct Mail Ad Plan

(i). Other Media Ad Plan

b. Additional Required/Special Query Reports

(1). USPS Add/Delete of Zip Codes (monthly)

(2). NRD/NRS Directory (monthly)

(3). Postage (monthly)

(4). Telephone Analysis (weekly/monthly/FYTD)

(5). Inventory/Audit (monthly/quarterly)

(6). Local Direct Mail Reports

(7). Navy Marketing Intelligence (NMI) Reports (monthly)

(8). NMI Flash Report (weekly)

(9). NMI CNP Executive Reports (monthly/quarterly)

(10). NASCAR Report (weekly)

(11). Diversity Leads and New Contracts Report (monthly)

(12). Project Status Report (Is this referencing the CE weekly report provided to N92?)

(13). Ad hoc queries for reports/data from NALTS or other automated systems used in leads management.

3. Leads/Contract Reports

   a. Weekly "dashboard" reports of leads generated, conversion rates and contracts by source/channel/events marketing venue and compared to previous year. Reports are in graphical format.

   b. Monthly "dashboard" reports of leads generated, conversion rates and contracts by source/channel/events marketing venue and compared to previous year. Reports are in graphical format.

   c. Internet Activity Report (to include site visits, "click-throughs", year-to-date visits, length of

visits, etc.). Report format will be provided by CNRC.

d. Various ad hoc queries for reports and data as requested by CNRC management.

ATTACHMENT J-4
EVENT MARKETING SERVICES

The following event marketing services are currently utilized by Navy and initially the agency will be required to continue to provide these same services/properties to CNRC in support of recruiting events across the country until the agency recommends changes and Navy agrees:

1. FLIGHT SIMULATORS. Yearly services to provide three (3) mobile movie-ride flight simulators (two each twenty-seat simulators and one eight-seat simulator) through Pulseworks Simulation, LLC. The simulators are designed for outdoor use at events such as air shows, state fairs, fleet weeks and other locations determined by the Navy Recruiting Command. Services provided include all management, operation, maintenance, scheduling and coordinating needs and aspects of the simulators including leads collection relating to program events.
2. EXHIBIT DISPLAYS. Yearly services to provide, support, and transport three (3) portable exhibit displays/booths to Navy Recruiting special events across the country. The CNRC event schedule includes air shows, diversity fairs/conferences, Fleet Weeks, professional and collegiate sporting events, and major conventions. The events are intended to promote interest and attract high

quality candidates to the Navy and normally range from one to five days in length: eight to twelve hours each day. The exhibit displays must be attractive, large-scale, multi-functional, information booths that provide a setting at each scheduled event for Navy recruiters to share information with prospective Navy candidates about career opportunities offered by the Navy. Services to be provided include design, fabrication/construction, expedited transportation, management, set-up, breakdown, maintenance and on-site security, where venue is unsecured, of the exhibit displays during the performance period.

3. NASCAR SHOWCAR AND SIMULATOR: Yearly services to provide Navy showcar and simulator appearances at events to support awareness, leads generation activities, and recruiting nationwide. Navy NASCAR showcar must be equipped with an operable engine and be a replica of the actual Navy's racecar. Services include appropriate and required set up and operation of the showcar and simulators, and leads collection and reporting. A total of 275 event/travel days are needed each year.
4. CONVENTION SUPPORT SERVICES: Yearly services to provide all elements of convention support for CNRC to attend medical, diversity, and education conventions and conferences across the country. The purpose of Navy's presence is to educate attendees on opportunities the Navy has to offer, allow recruiters to interact with potential officer or enlisted candidates, both active and reserve, and generate leads. Support services include providing management, coordination, scheduling, reservations/booth spaces,

transportation, actual booth/display units, exhibit services, set-up and dismantling of booths, and warehousing of exhibits required for each venue. CNRC estimates participation in approximately 40 events each year.

ATTACHMENT J-5
GLOSSARY OF TERMS

ACO	Administrative Contracting Officer
ADPACK	Advertising Package (contains various display and line ads)
AQD	Accession Quality Designator
CHC	Chaplain Corps
CIRIMS	COMNAVCRUITCOM Integrated Recruiting Information Management System
CNP	Chief of Naval Personnel, Washington, DC
CNRC	Commander, Navy Recruiting Command
COMNAVRESFOR	Commander, Naval Reserve Force
COR	Contracting Officer's Representative
DC	Dental Corps
DCM	Defense Contract Management
DCO	Direct Commission Officer
DD	Department of Defense
DFAS	Defense Finance and Accounting Service
DHRA	Defense Human Resources Agency
DOD	Department of Defense
DON	Department of the Navy
FAP	Financial Assistance Program

FISC	Fleet and Industrial Supply Center
FY	Fiscal Year
GPO	Government Printing Office
HPSP	Health Professional Scholarship Program
IVR	Interactive Voice Response
JAG/JAGC	Judge Advocate General Corps
JAMRS	Joint Advertising Market Research Studies
LDM	Local Direct Mail
MC	Medical Corps
MSC	Medical Service Corps
NALTS	Navy Advertising Leads Tracking System
NC	Nurse Corps
NMCI	Navy Marine Corps Intranet
NMI	Navy Marketing Intelligence
NOIC	Navy Opportunity Information Center
NRD	Navy Recruiting District
NRS	Navy Recruiting Station
NUPOC	Nuclear Propulsion Officer Candidate
OBM	Office of Management and Budget
OCS	Officer Candidate School
PAO	Public Affairs Officer
PCO	Procuring Contracting Officer
PEL	Program Eligible Lead
RAD	Recruiter Assistance Device

ROI	Return on Investment
SSP	Subspecialty
VET	Veterans
VTC	Video Teleconference

CORPORATE EXPERIENCE & PAST PERFORMANCE INFORMATION FORM				*Form __ of 5*
Name of Offeror:				
Contract Number:				
Customer Name & Location:				
Customer Point of Contact (Name & Title):				
Telephone Number (PLEASE VERIFY):				
Total dollar amount (receipts) for this contract during the past three years: (For ordering agreement, show both the annual maximum contract amount and the amount of orders actually performed.)		*2003* *$*	*2002* *$*	*2001* *$*
Number of personnel (FTE) provided per year (average):		*Period of Performance for the contract:*		*From: To:*

Detailed description of the work performed sufficient to demonstrate the relevance of the reference to the solicitation:
Quality, delivery, or cost problem(s); corrective action(s) taken; and effectiveness of the corrective action(s):
Subcontractor(s) Utilized in Performance of this contract, description of the extent of work performed by subcontractor(s), along with annual dollar value of all subcontracts:

52.212-5 CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS COMMERCIAL ITEMS (JAN 2005)

(a) The Contractor shall comply with the following Federal Acquisition Regulation (FAR) clauses, which are incorporated in this contract by reference, to implement provisions of law or Executive orders applicable to acquisitions of commercial items:

(1) 52.233-3, Protest after Award (AUG 1996) (33 U.S.C 3553).

(2) 52.233-4, Applicable Law for Breach of Contract Claim (OCT 2004) (Pub. L. 108-77. 108-78)

(b) The Contractor shall comply with the FAR clauses in this paragraph (b) that the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or Executive orders applicable to acquisitions of commercial items: [Contracting Officer check as appropriate.]

X	(1) 52.203-6,	Restrictions on Subcontractor Sales to the Government (JUL 1995) with Alternate 1 (OCT 1995) (41 U.S.C 253g and 10 U.S.C. 2402).
____	(2) 52.219-3,	Notice of Total HUBZone Set-Aside (Jan 1999) (15 U.S.C. 657a).
X	(3) 52.219-4,	Notice of Price Evaluation Preference for HUBZone Small Business Concerns (Jan 1999) (if the offeror elects to waive the

preference, it shall so indicate in its offer)(15 U.S.C. 657a).

____ (4)(i) 52.219-5, Very Small Business Set-Aside (JUNE 2003) (Pub. L. 103-403, section 304, Small Business Reauthorization and Amendments Act of 1994).

____ (ii) Alternate I (MAR 1999) of 52.219-5.

____ (iii) Alternate II (JUNE 2003) of52.219-5.

____ (5)(i) 52.219-6, Notice of Total Small Business Set-Aside (JUNE 2003) (15 U.S.C. 644).

____ (ii) Alternate I (OCT 1995) of 52.219-6.

____ (iii) Alternate II (MAR 2004) of 52.219-6.

____ (6)(i) 52.219-7, Notice of Partial Small Business Set-Aside (JUNE 2003) (15 U.S.C. 644).

____ (ii) Alternate I (OCT 1995) of 52.219-7.

____ (iii) Alternate II (MAR 2004) of 52.219-7.

X (7) 52.219-8, Utilization of Small Business Concerns (MAY 2004) (15 U.S.C. 637(d)(2) and (3)).

____ (8)(i) 52.219-9, Small Business Subcontracting Plan (JAN 2002) (15 U.S.C 637(d)(4)).

____ (ii) Alternate I (OCT 2001) of 52.219-9.

____ (iii) Alternate II (OCT 2011) of 52.219-9.

____ (9) 52.219-14, Limitations on Subcontracting (DEC 1996)(15 U.S.C.637(a)(l4)).

____	(10)(i) 52.219-23,	Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns (JUNE 2003) ___% (Pub.L. 103-355, section 7102. and 10 U.S.C. 2323) (if the offeror elects to waive the adjustment, it shall so indicate in its offer).
____	(ii) Alternate I (JUNE 2003) of 52.219-23. __%	
____	(11) 52.219-25,	Small Disadvantaged Business Participation Program–Disadvantaged Status and Reporting (OCT 1999) (Pub. L. 103-355. section 7102. and 10 U.S.C. 2323).
____	(12) 52.219-26,	Small Disadvantaged Business Participation Program–Incentive Subcontracting (OCT 2000) __ % (Pub.L. 103-355, section 7102, and 10 U.S.C. 2323).
____	(13) 52.219-27,	Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside (MAY 2004).
X	(14) 52.222-3,	Convict Labor (JUNE 2003)(E.O. 11755).
____	(15) 52.222-19,	Child Labor–Cooperation with Authorities and Remedies (JUNE 2004)(E.O. 13126).

X	(16) 52.222-21,	Prohibition of Segregated Facilities (Feb 1999)
X	(17) 52.222-26,	Equal Opportunity (APR 2002) (E.O. 11246).
X	(18) 52.222-35,	Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (DEC 2001) (38 U.S.C. 4212).
X	(19) 52.222-36,	Affirmative Action for Workers with Disabilities (JUN 1998)(29 U.S. C. 793).
X	(20) 52.222-37,	Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (DEC 2001)(38 U.S.C. 4212).
____	(21) 52.222-39,	Notification of Employee Rights Concerning Payment of Union Dues or Fees (DEC 2004) (E.O. 13201).
____	(22)(i) 52.223-9,	Estimate of Percentage of Recovered Material Content for EPA-Designated Products (AUG 2000) (42 U.S.C. 6962(c)(3)(A)(ii)).
____	(ii) Alternate I (AUG 2000) of 52.223-9 (42 U.S.C. 6962(i)(2)(C)).	
____	(23) 52.225-1,	Buy American Act-Supplies (JUNE 2003)(41 U.S.C. 10a-10d).

____	(24)(i) 52.225-3,	Buy American Act-Free Trade Agreements-Israeli Trade Act (JAN 2005) (41 U.S.C. 10a-10d. 19 U.S.C. 3301 note, 19 U.S.C. 2112 note, Pub.L. 108-77, 108-78. 108-286).
___	(ii) Alternate I (JAN 2004) of 52.225-3.	
___	(iii) Alternate II (JAN 2004) of 52.225-3.	
____	(25) 52.225-5,	Trade Agreements (JAN 2005) (19 U.S.C. 2501, et seq., 19 U.S.C. 3301 note).
____	(26) 52.225-13,	Restrictions on Certain Foreign Purchases (DEC 2003)(E.o.s. proclamations, and statutes administered by the Office of Foreign Assets Control of the Department of the Treasury).
____	(27) 52.225-15,	Sanctioned European Union Country End Products (FEB 2000)(E.O. 12849).
____	(28) 52.225-16,	Sanctioned European Union Country Services (FEB 2000)(E.O. 12849).
____	(29) 52.232-29,	Terms for Financing of Purchases of Commercial Items (FEB 2002) (41 U.S.C. 255(f), 10 U.S.C. 2307(f)).
____	(30) 52.232-30,	Installment Payments for Commercial Items (OCT 1995) (41 U.S.C. 255(f), 10 U.S.C. 2307(f)).

X	(31) 52.232-33,	Payment by Electronic Funds Transfer - Central Contractor Registration (OCT 2003)(31 U.S.C. 3332).
____	(32) 52.232-34,	Payment by Electronic Funds Transfer - Other than Central Contractor Registration (MAY 1999)(31 U.S.C. 3332).
____	(33) 52.232-36,	Payment by Third Party (MAY 1999)(31 U.S.C. 3332).
____	(34) 52.239-1,	Privacy or Security Safeguards (AUG 1996)(5 U.S.C. 552a).
____	(35)(i) 52.247-64,	Preference for Privately Owned U.S.-Flag Commercial Vessels (APR 2003) (46 U.S.C. Appx 1241 and 10 U.S. C. 2631).
____	(ii) Alternate I (APR 2003) of 52.247-64.	

(c) The Contractor shall comply with the FAR clauses in this paragraph (c), applicable to commercial services, that the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or Executive orders applicable to acquisitions of commercial items:

[Contracting Officer check as appropriate.]

____	(1) 52.222-41,	Service Contract Act of 1965, as Amended (MAY 1989)(41 U.S.C. 351, et seq.).
____	(2) 52.222-42,	Statement of Equivalent Rates for Federal Hires

(MAY 1989) (29 U.S.C. 206 and 41 U.S.C 351, et seq.).

___ (3) 52.222-43, Fair Labor Standards Act and Service Contract Act-Price Adjustment (Multiple Year and Option Contracts) (MAY 1989)(29 U.S.C.206 and 41 U.S.C.351, et seq.)

___ (4) 52.222-44, Fair Labor Standards Act and Service Contract Act-Price Adjustment (FEB 2002) (29 U.S.C 206 and 41 U.S.C. 351, et seq.).

___ (5) 52.222-47, SCA Minimum Wages and Fringe Benefits Applicable to Successor Contract Pursuant to Predecessor Contractor Collective Bargaining Agreements (CBA) (MAY 1989) (41 U.S.C. 351, et seq.).

(d) Comptroller General Examination of Record. The Contractor shall comply with the provisions of this paragraph (d) if this contract was awarded using other than sealed bid, is in excess of the simplified acquisition threshold, and does not contain the clause at 52.215-2, Audit and Records—Negotiation.

(1) The Comptroller General of the United States, or an authorized representative of the Comptroller General, shall have access to and right to examine any of the Contractor's directly pertinent records involving transactions related to this contract.

(2) The Contractor shall make available at its offices at all reasonable times the records, materials, and

other evidence for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in FAR Subpar 4.7, Contractor Records Retention, of the other clauses of this contract. If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement. Records relating to appeals under the disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are finally resolved.

(3) As used in this clause, records include books, documents, accounting procedures and practices, and other data, regardless of type and regardless of form. This does not require the Contractor to create or maintain any record that the Contractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(c)(1) Notwithstanding the requirements of the clauses in paragraphs (a), (b), (c), and (d) of this clause, the Contractor is not required to flow down any FAR clause, other than those in paragraphs (i) through (vii) of this paragraph in a subcontract for commercial items. Unless otherwise indicated below, the extent of the flow down shall be as required by the clause -

(i) 52.219-8, Utilization of Small Business Concerns (MAY 2004)(15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds $500,000 ($1,000,000 for construction of

any public facility). the subcontractor must include 52.219-8 in lower tier subcontracts that offer subcontracting opportunities.

(ii) 52.222-26, Equal Opportunity (APR 2002)(E.O. 11246).

(iii) 52.222-35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (DEC 2001) (38 U.S.C. 4212).

(iv) 52.222-36, Affirmative Action for Workers with Disabilities (JUNE 1998) (29 U.S.C. 793).

(v) 52.222-39, Notification of Employee Rights Concerning Payment of Union Dues or Fees (DEC 2004) (E.O. 13201).

(vi) 52.222-41, Service Contract Act of 1965, as Amended (MAY 1989), flow down required for all subcontracts subject to the Service Contract Act of 1965 (41 U.S.C. 351, et seq.).

(vii) 52.2-17-64, Preference for Privately-Owned U.S.-Flag Commercial Vessels (APR 2003) (46 U.S.C. Appx 1241 and 10 U.S.C. 2631).

Flow down required in accordance with paragraph (d) of FAR clause 52.247-64.

(3) While not required, the contractor may include in its subcontracts for commercial items a minimal

number of additional clauses necessary to satisfy its contractual obligations.

252.212-7001 CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS APPLICABLE TO DEFENSE ACQUISITIONS Of COMMERCIAL ITEMS (JAN 2005)

(a) The Contractor agrees to comply with the following Federal Acquisition Regulation (FAR) clause which, if checked, is included in this contract by reference to implement a provision of law applicable to acquisitions of commercial items or components.

X 52.203-3 Gratuities (APR 1984) (10 U.S.C. 2207).

(b) The Contractor agrees to comply with any clause that is checked on the following list of Defense FAR Supplement clauses which, if checked, is included in this contract by reference to implement provisions of law or Executive orders applicable to acquisitions of commercial items or components.

____ 252.205-7000 Provision of Information to Cooperative Agreement Holders (DEC 1991) (10 U.S.C. 2416).

____ 252.219-7003 Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan (DoD Contracts) (APR 1996) (15 U.S.C. 637).

____ 252.219-7004 Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan (Test Program) (JUN 1997) (15 U.S.C. 637 note).

____ 252.225-7001 Buy American Act and Balance of Payment Program (APR 2003) (41 U.S.C. 10a-10d, E.O. 10582).

____ 252.225-7012 Preference for Certain Domestic Commodities (JUN 2004) (10 U.S.C. 2533a).

____ 252.225-7014 Preference for Domestic Specialty Metals (APR 2003) (10 U.S. C. 2533a).

____ 252.225-7015 Preference for Domestic Hand or Measuring Tools (APR 2003) (10 U.S.C. 2533a).

____ 252.225-7016 Restriction on Acquisition of Ball and Roller Bearings (MAY 2004) (__Alternate I) (APR 2003) (10 U.S.C. 2534 and Section 8099 of Public Law 104-61 and similar sections in subsequent DoD appropriations acts).

____ 252.225-7021 Trade Agreements (JAN 2005) (19 U.S.C. 2501-2518 and 19 U.S.C. 3301 note).

____ 252.225-7027 Restriction on Contingent Fees for Foreign Military Sales (APR 2003) (22 U.S.C. 2779).

____ 252.225-7028 Exclusionary Policies and Practices of Foreign Governments (APR 2003) (22 U.S.C. 2755).

____ 252.225-7036 Buy American Act–Free Trade Agreements–Balance of Payments Program (JAN 2005) (–Alternate 1) (JAN 2005) (41 U.S.C. 10a-10d and 19 U.S.C. 3301 note).

____ 252.225-7038 Restriction on Acquisition of Air Circuit Breakers (APR 2003) (10 U.S.C. 2534(a)(3)).

____ 252.226-7001 Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns (SEP 2004) (Section 8021 of Public Law 107-248 and similar sections in subsequent DoD appropriations acts).

X 252.227-7015 Technical Data–Commercial Items (NOV 1995) (10 U.S.C. 2320).

____ 252.227-7037 Validation of Restrictive Markings on Technical Data (SEP 1999) (10 U.S. C. 2321).

____ 252.232-7003 Electronic Submission of Payment Requests (JAN 2004) (IO U.S.C. 2227).

____ 252.243-7002 Requests for Equitable Adjustment (MAR 1998) (10 U.S.C. 2410).

____ 252.247-7023 Transportation of Supplies by Sea (MAY 2002) (_____Alternate I) (MAR 2000) (___Alternate II) (MAR 2000) (_____Alternate II)(May 2002)(10 U.S.C. 2631).

____ 252.247-7024 Notification of Transportation of Supplies by Sea (MAR 2000) (10 U.S.C. 2631).

(c) In addition to the clauses listed in paragraph (e) of the Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items clause of this contract (Federal Acquisition Regulation 52.212-5), the Contractor shall include the terms of the following clauses, if applicable, in subcontracts for commercial items or commercial components, awarded at any tier under this contract:

252.225-7014 Preference for Domestic Specialty Metals. Alternate I (APR 2003) (10 U.S.C. 2533a).

252.247-7023 Transportation of Supplies by Sea (MAY 2002) (10 U.S.C. 2631).

252.247-7024 Notification of Transportation of Supplies by Sea (MAR 2000) (10 U.S.C. 2631)

(End of clause)

252.232-7003 ELECTRONIC SUBMISSION OF PAYMENT REQUESTS (JAN 2004)

(a) Definitions. As used in this clause –

(1) Contract financing payment and invoice payment have the meanings given in section 32.001 of the Federal Acquisition Regulation.

(2) Electronic form means any automated system that transmits information electronically from the initiating system to all affected systems. Facsimile, e-mail, and scanned documents are not acceptable electronic forms for submission of payment requests. However, scanned documents are acceptable when they are part of a submission of a payment request made using one of the electronic forms provided for in paragraph (b) of this clause.

(3) Payment request means any request for contract financing payment or invoice payment submitted by the Contractor under this contract.

(b) Except as provided in paragraph (c) of this clause, the Contractor shall submit payment requests using one of the following electronic forms:

(1) Wide Area Work Flow-Receipt and Acceptance (WAWF-RA). Information regarding WAWF-RA is available on the Internet at https://wawf.cb.mil.

(2) Web Invoicing System (WInS). Information regarding WinS is available on the Internet at https://ecweb.dfas.mil.

(3) American National Standards Institute (ANSI) X.12 electronic data interchange (EDI) formats.

(i) Information regarding EDI formats is available on the Internet at http://www.X12.org.

(ii) EDI implementation guides are available on the Internet at http://www.dfas.mil/ccedi.

(4) Another electronic form authorized by the Contracting Officer.

(c) If the Contractor is unable to submit a payment request in electronic form, or DoD is unable to receive a payment request in electronic form, the Contractor shall submit the payment request using a method mutually agreed to by the Contractor, the Contracting Officer, the contract administration office, and the payment office.

(d) In addition to the requirements of this clause, the Contractor shall meet the requirements of the appropriate payment clauses in this contract when submitting payments requests.

(End of clause)

SF 1440 CONTINUATION SHEET	REFERENCE NO. OF DOCUMENT BEING CONTINUED N00600-00-D-6048-VJBB	PAGE 2	OF 3
	NAME OF OFFEROR OR CONTRACTOR: CAMPBELL-EWALD		

ITEM NO.	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0503	LOT VI - OPTION V	[redacted]	LOT	[redacted]	[redacted]

FFP - Additional
Advertising Services to:
Acquire additional media
consisting of, but not
limited to, television, radio,
internet, etc. to increase

Navy's share of voice, promote Navy brand awareness, and generate eligible leads.

Work shall commence immediately upon award of this order to develop a proposed Media Plan detailing recommended media purchases and associated costs. The Media Plan will be submitted to CNRC, Code N9, within 15 working days after award of the order for review and approval prior to implementation.

	PURCHASE REQUEST NUMBER N6671505RC83204 ACRN AA Funded Amount - [redacted]	NET AMOUNT [redacted]
050301	LOT VI - OPTION V FFP – Services - Agency Segment Rates Per Hour TBO	
050302	LOT VI - OPTION V FFP - Other Direct Expenses Additional Media - [redacted]	

ACCOUNTING AND APPROPRIATION DATA

ACR:AA 1751804.22NA 000 66715 068888
2D C83204 66715601924Y
AMOUNT: [redacted]
PURCHASE REQUEST NUMBER
N6671505RC83204

ESTIMATED BILLING SCHEDULE:
To be submitted with Media Plan

CLINS	DELIVERY DATE	UNIT OF ISSUE	QTY	FOB	SHIP TO ADDRESS
0503	19 May 06		[redacted]	DEST	CNRC MILLINGTON
050301	19 May 06			DEST	CNRC MILLINGTON
050302	19 May 06			DEST	CNRC MILLINGTON

1. Invoices shall be submitted at the end of each month.
2. The delivery order will be paid by DFAS-COLUMBUS CENTER, NORTH OPERATIONS
3. Refer all questions to Edna Delk at (901) 874-9406 or e-mail edna.delk@navy.mil

DUNS: 00597658 CAGE: 1P2G8

OPTIONAL FORM 338 (4-85)
Sponsored by GSA
FAR (48 CFR) 53.110

SF1449 Continuation Sheet	N00800-00-D-6048-VJBB	Page 3	Of 3
	Name of Offeror / Contractor: Campbell-Ewald		

ADDITIONAL MEDIA UNDER CLIN 0503
STATEMENT OF WORK

1. Background.

Contract Line Item Number 0502 under Contract N00600-00-D-6048 is established for Navy Recruiting Command to acquire space charges and media placement in support of each annual Navy Recruiting Strategic Plan. If additional space charges and media placement are needed, task orders may be placed under CLIN 0503, Additional Advertising Services.

2. Objective.

CNRC requests Campbell-Ewald acquire additional media consisting of, but not limited to, television, radio, internet, etc. to increase Navy's share of voice, promote Navy brand awareness, and support recruiting efforts. Campbell-Ewald shall use its best efforts to obtain the lowest commercial rate available for media placement. All media discounts and rebate credits shall accrue to Navy Recruiting Command.

3. Deliverables.

Campbell-Ewald will provide a proposed Media Plan to CNRC Code N9 within 15 working days after award of the order for review and approval prior to implementation.

4. Period of Performance.

Work will commence immediately upon award of the order and completion is scheduled for 19 May 2006.

Navy 2006 Wireless / Mobile

Tactical Media Recommendations

17 March 2006

CAMPBELL EWALD [Logo omitted]

Agenda

- Mobile Marketing
- 2005 Learning
- 2006 Strategy
- 2006 Tactical Recommendations / Examples
- Timing / Next Steps

Mobile Marketing

- Mobile marketing is a two-way communication via text, graphics, pictures, audio (voice), and/or video that can reach anyone, anywhere, at anytime

Source: *Wikipedia*

Wireless / Mobile Media

- **Mobile Marketing via cell phone is the most nonstandardized medium today:**
  - Over 500 handset models
  - Over 20 domestic cellular service providers/carriers
- **Nonetheless, Mobile Marketing holds great promise:**
  - Currently, over 190 million cellular/mobile customers in the U.S.
  - 66 million use Short Message Service (SMS) text messaging
  - 68% of 18-24 year olds are actively text messaging
  - 25 million access info using Wireless Application Protocol (WAP)
  - 20 million have interacted with an ad via SMS
  - 33% of young adults willing to receive mobile marketing in exchange for something of value
  - 35% willing to trade personal information for relevant offers
  - 90% of text messages are opened within 5 minutes of receipt

* Jupiter Media Research. December 2005

2005 Mobile Learning

- AvantGo was the top volume lead generator for the initial test period
  - provided the best conversion rate
  - But cost-per-EL was more than 25% above allowable level
- CPM buy on VindiGo proved to be the very least cost efficient
- SMS text message blasts were almost as inefficient
- Cost-per-Call pricing model was most cost efficient
  - However, tactic produced low call volume
- Click-to-Call tactic emerged as most cost-effective
  - Third Screen Media delivered 6.9% call rate
  - Go2 directory
  - Averaged 9,000 calls/week

05 Navy go2 with Click-to-Call

[graphics omitted]

05 Navy Third Screen w/Jun.p Page

Banner Ad Click-through (Jump) Page

[graphics omitted]

2005 Mobile Strategy

Objective:

- Generate Active Duty GEN leads

Strategies:

- Continue with Navy "Free Video" offer via sponsored content
- Build on 2005 learning / best practices
- Extend / expand Click-to-Call tactics
  - Alternative to requiring prospects to dial an 11-digit 800#
  - Keep the interaction simple
  - Eliminate extra steps for the prospect

2006 Recommendation

Vendor	Description	Cost
Enpocket / go2	Directory	$150,000
MindMatics	Broker	$50,000
Third Screen	Network	$50,000
VoodooVox	Service	$100,000
		$350,000

Enpocket / go2

- go2 is one of the most visited wireless websites in the U.S. today
  - Hosted over 24million unique mobile user sessions in 2005
  - Represents 85% of U.S. mobile customer base
- Demographics align well with the Navy target:
  - 39% age 14-35
  - 65% male
- go2 provides local directory search information across many major wireless carriers:
  - Verizon
  - Cingular
  - Sprint [graphic omitted]
  - T-Mobile

  - *Source: go2 User Survey, 2005*

Enpocket / go2

[graphic omitted]

Enpocket will....

- Develop and serve 3 WAP banner ads across the go2 directory pages
  - 4.5MM Impressions
  - Use click-to-call connection to Navy call center
- Development of 5 WAP landing pages
  - WAP site hosting
  - Database management
- Real-time online reporting

Enpocket / go2

[graphics omitted]

Banner Jump Page with Click-to-Call

MindMatics

- MindMatics is an international mobile marketing list broker with double opt-ins from registrations for directories (e.g. Zingy), date/match services, plus wallpaper and ring-tone downloads
- MindMatics has over 5 years experience and 3,000 mobile marketing campaigns worldwide and adheres to the MMA's best practices
- MindMatics will deliver a Navy branded SMS (text) direct mobile marketing "push" program to the cell phones of 150,000 Adults 18-24 from an opt-in list of over 3 million

MindMatics SMS Text

[graphic omitted]

- Wireless user may then select the number to be connected to the Navy's call center
- For mobile handsets that do not have "click-to-call" capacity, prospects will be able to dial the number directly
- MindMatics' servers will support a "fwd to a friend" feature for a viral / referral marketing component

* * *

mindmatics

CAMPBELL-EWALD
30400 Van Dyke Avenue
Warren, MI 48093

– Service Proposal for U.S. Navy Direct Mobile Marketing –

4/2/2006

MindMatics LLC
415 Madison Avenue, 20th Floor
New York, NY 10017
United States
t. 212 355-8245
f. 212 355-8276

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A. Service Scope

1. Project Objective

Campbell-Ewald is a full-service marketing agency, deploying campaigns for clients across multiple different media. For its client, the U.S. Navy, Campbell-Ewald Media is looking for a mobile marketing partner to execute a wireless marketing project from May to June 2006. The client's goal is to increase viable recruiting recruitment leads in order to enroll 38,000 new sailors this year.

MindMatics is the industry's leading full-service provider of mobile marketing and technology solutions with more than five years experience and over 3,000 mobile marketing campaigns conducted worldwide. MindMatics enables clients to reach and interact with their customers via their mobile handsets, anytime, anywhere. With Campbell-Ewald, MindMatics will create an overall, integrated mobile marketing strategy for to implement for the Navy and then execute utilizing MindMatics' carrier-grade infrastructure.

MindMatics has identified three primary business objectives:.

a. Increase leads for U.S. Naval recruits via mobile marketing

b. Enable response and interactivity with potential applicants via mobile phones

c. Reinforce the Navy's brand with every interaction the brand

MindMatics' programs offer clients the greatest possible flexibility in mobile marketing and tactics, from straight media buys to complete creative

development and deployment. Further, MindMatics strictly adheres to MMA standards to protect our clients and ensure the highest response rates.

2. Direct Mobile Marketing: Click-to-Call

The purpose of this type of program is to deliver to a mobile phone a marketing message via SMS text messaging. Each message will have an embedded phone number, which the recipient can easily use to call the Navy's call center. As mobile marketing requires an opt-in from the end user, MindMatics will offer the Navy a direct mobile marketing push program utilizing MindMatics' opted-in list of users. Every message delivered will be branded with the U.S. Navy's name.

MindMatics delivers direct mobile marketing messages for clients directly to consumers' phones, utilizing MindMatics' managed mobile list. This list has over 12 million qualified, pre-opted-in mobile users (more than 3 million U.S.) who have requested that marketing offers be sent to them. This list can be broken down by multiple demographics including geography, wireless carrier, age group, and gender. This access and target-marketing are unique opportunities that MindMatics delivers to its clientele.

For the Navy, MindMatics can specifically select men and women between the ages of 18 to 24 to receive mobile marketing messages. This increases the chances of generating eligible leads for the Navy and reduces unnecessary media expenditure.

For example, MindMatics on behalf of the Navy sends out targeted SMS text messages of, "Money for college. Unique career opportunities. The Navy makes it possible! Get your DVD by clicking or calling 800-XXX-XXXX to apply. <U.S. NAVY>" The wireless

user can then select "call number' (or similar menu option), to connect directly to the Navy's call center. For mobile handsets that do not have such features, the applicant will have the correct phone number recorded for them to dial manually.

Direct mobile marketing campaigns have proven to have a significantly higher response rate than direct mail or direct e-mail. This is partially due to the fact that the mobile arena/SMS world is "zero spam"

B. Project Scope

MindMatics will provide its carrier-grade infrastructure to facilitate the mobile marketing campaign. MindMatics is responsible for all necessary gateways, short-codes, and connectivity to deploy the programs for Campbell-Ewald.

MindMatics will utilize its list of more than three million U.S. opted-in mobile numbers to send direct mobile marketing messages.

MindMatics will develop and manage each mobile marketing campaign. This will be done in conjunction with Campbell-Ewald. Text messages in the U.S. are limited to 160 characters.

MindMatics suggests that Campbell-Ewald create the text message(s) and supply a schedule of when the messages are to be delivered to MindMatics. MindMatics will then schedule the messages for delivery. Further, MindMatics can supply additional guidance on crafting the message(s).

MindMatics will provide reporting tools to enable Campbell-Ewald to actively monitor the Navy mobile campaign.

C. Pricing Proposal

Direct Mobile Marketing Click-to-Call	Price
Navy Mobile Marketing (May to June 2006) • Set-Up/Connectivity/Gateway • Program Development • Campaign Management • Customer Targeting • Delivery/Push from MindMatics' opted-in list (150,000 total)	[redacted]

D. References

* * *

E. General Conditions

1. Term

Prices are firm through April 6, 2006.

2. Non-disclosure

This proposal is exclusively for Campbell-Ewald and will not be shared with third parties in any form or used for any purpose other than evaluation of the proposal.

3. Payments

All fixed and one-time costs are due upon contract signing.

4. Taxes

All project items are exclusive of applicable taxes.

5. Terms & Conditions

The attached MindMatics Terms & Conditions apply.

We hope that this proposal fits your expectation and look forward to receiving your signed approval. We welcome any further questions you may have.

New York, 4/6/2006

Best regards,

Jordan Greene
Sales Director
MindMatics LLC

Project Acceptance

We accept the offer of MindMatics LLC for the services described above for a target launch on _____ 2006.

Campbell-Ewald	**MindMatics, LLC**
_____	_____
Date	Date
_____	_____
Signature	Signature
Daniel Rioux	Jordan Greene
_____	_____
Name (Print)	Name (Print)
VP, Associate Media Director	Sales Director
_____	_____
Title / Position	Title / Position

Terms and Conditions

1. TERMS, DEFINITIONS & ORDERS

1.1. These terms and conditions (the "Terms") shall apply to the provision of Aggregation Services, and, with respect to any Campaign, Advertising Services, Database Services and Media Creation Services (together the "Services") and the Deliverables by the Company to the Customer.

1.2. In these Terms, the following words and expressions shall have the respective meanings set forth below:

"Address" means with respect to any Campaign any phone number or email address or the like to which any Advertising Services are directed in such Campaign.

"Advertising Services" means with respect to any Campaign, sending or receiving Messages, as specified in any Order.

"Aggregation Services" means with respect to any Order, facilitating or permitting Customer to send or receive a fixed number of Messages, as specified in such Order.

"Applicable" Jurisdiction" means any jurisdiction (a) in which any Content or Personal Data is developed on to or through which it is delivered hereunder and (b) with respect to Personal Data, all jurisdiction(s) in which the relevant individual (1) resides and (2) from which he or she sends Personal Data or (3) in which he or she receives any Personal Data.

"Campaign" means an advertising campaign described with particularity in a Quotation.

"Company" means MindMatics LLC, having an office at 415 Madison Avenue 20th floor, New York, NY 10017, United States.

"Confidential Information" means all information designated as such by either party in writing together with all other information which relates to the business, affairs, products, developments, trade secrets, know-how, personnel, customers and suppliers of either party or information which may reasonably be regarded as the Confidential Information of the disclosing party.

"Consumer" means any individual receiving any Outgoing Message or sending any Incoming Message.

"Consumer Content" means the Content of any Incoming Message.

"Content" means all content, including without limitation, all text, graphics, still and moving pictures, audio, audio-visual material, software, information and data (a) contained in any Message or (b) delivered to Company by Customer (including without limitation, as applicable, Addresses) for use in any Campaign.

"Customer" means the person, company, firm or organization for which Services are to be performed as identified in the Order.

"Customer Content" means all Content that are to be provided by the Customer to the Company to be used in any Message or in delivering the Services or the Deliverables.

"Database Services" means the use by Company of Addresses supplied by Company or its licensors for a Campaign.

"Deliverables" means any item delivered by the Company under these Terms which has been designed, developed or adapted using the Media Creation Services.

"Incoming Messages" means fixed or wireless messages using any Technology originating from a Consumer in accordance with any Order.

"Intellectual Property Rights" means patents, trade marks, service marks, design rights (whether registerable or otherwise), applications for any of the foregoing, copyright, database rights, trade or business names and other similar rights or obligations whether registerable or not in any country (including but not limited to the United States, the United Kingdom and Germany).

"Media Creation Services" means design and development services including but not limited to design and development of Messages using any current formats such as GIF, JPEG, Tiff; design and production of mobile value added services; interactive and rich media banners; games; flash animations with sound; and TV-Spots;

"Message" means any Incoming Message and any Outgoing Message, sent or received pursuant to an Order.

"Nonconforming Content" means any Content that (a) infringes the rights, of any third party, including without limitation, intellectual property

rights, privacy rights, moral rights and rights to withhold or condition consent to use of one's image or name or the like, (b) fails to comply with any law or regulations in any Applicable Jurisdiction, (c) is not sent for a lawful purpose; (d) is defamatory, offensive, abusive, pornographic, obscene or menacing (as those terms are defined in any Applicable Jurisdiction) or is intended to harass or annoy or includes sexist, hostile or racist references or wrongfully discloses any privileged or private information or constitutes an invasion of anyone's privacy; (e) is not age-appropriate; (f) is delivered to Company by or on behalf of Customer without having been checked using the latest commercially available software to ensure that it contains no viruses, worms, spyware or the like; (g) in the case of any Outgoing Message, fails to comply with any applicable advertising guidelines, including without limitation, ICC guidelines on advertising and marketing on the Internet, ICSTIS guidelines and the E-Money regulations; (h) in the case of any Address, is not eligible for permissible use in the applicable Campaign in accordance with laws or regulations in any Applicable Jurisdiction (and without limiting the foregoing, if any Applicable Jurisdiction requires that no Message be sent to an Address in unless the intended recipient shall have "opted in" to receive such Message, no such opt-in shall have occurred); or (i) is otherwise not in compliance with the Terms.

"Order" means an order for the Services and/or Deliverables placed by the Customer using the

Company's order form and specifically referencing a Quotation.

"Outgoing Message" means any fixed or wireless message using any Technology sent by the Customer or by Company on Customer's behalf, in either case pursuant to any Order.

"Personal Data" has the meaning attributed to "personal data" in the European Union Data Protection Directive 95/46/EC ("Directive") and consistent with the privacy standards of the Safe Harbor Privacy Principles framework of the United States Department of Commerce ("Principles") or any successor or supplement to the Principles or equivalent national implementation thereof and specifically includes without limitation any personal data (a) comprised in or relating to any message, (b) that is an Address, or (c) included in or related to any Return Message;

"Quotation" means a firm written price quotation (signed by an authorized representative of Company and addressed to Customer) to perform all, but not less than all of the Services described in a set of complete specifications attached thereto;

"Return Message" means any message or communication, including without limitation, any email or SMS, sent by or on behalf of any recipient of any Message.

"Scheduled Commencement" means as to any Campaign described in any Order, the scheduled commencement of that Campaign.

"Technology" means any of SMS, MMS, WAP, GPRS, UMTS, email or other web-based technology.

1.3. No legally binding contract shall exist until the Company has confirmed its acceptance of the Customer's Order in writing. Services may only be ordered by submitting an Order that specifically references those Terms and the Company's Quotation, as described in Section 3.

1.4. In the event and to the extent only of any conflict between these Terms and the Order, the Order shall prevail but only in relation to those Services and/or Deliverables placed under that Order. No terms in any purchase order or other correspondence delivered by Customer shall apply to any Order hereunder, unless expressly countersigned by Company.

2. SERVICES & CONTENT

2.1. In the case of Orders specifying Aggregation Services, Company will not be providing Advertising Services, Database Services or Media Creation Services. Customer shall be solely responsible for all Messages.

2.2. If Customer does not order Media Creation Services for any Campaign, then Customer shall be solely responsible for timely delivery to Company of the Message to be used in such Campaign. If Customer does not order Database Services for any Campaign, then Customer shall be solely responsible for timely delivery to Company of all Addresses to be used in such Campaign.

2.3. Customer shall ensure that (a) the Customer Content is delivered to the Company at least five (5) business days before applicable Scheduled Commencement unless otherwise agreed in writing and (b) the Customer Content contains no Nonconforming Content.

2.4. If Customer requires Media Creation Services, all Customer Content that is intended for inclusion in the Campaign must be supplied to the Company at least 15 business days before the applicable Scheduled Commencement.

2.5. Company is not liable for Customer Content supplied and is not obliged to store the Customer Content for any particular period of time or to return any materials to the Customer unless otherwise agreed in writing.

2.6. Company shall supply the Services and the Deliverables in accordance with these Terms and any additional terms set out in the confirmed Order.

2.7. Customer will be obliged to approve all Deliverables before the start of a Campaign. This may take the form of an SMS, email, web format or other means. The Customer will be informed about the required approval and shall either approve the Deliverables or report any errors or omissions in the Deliverables by the end of the following business day after receipt of the Deliverables. Thereafter the Deliverables are considered to be approved and the Customer will be responsible for any cost of subsequent changes or adjustments.

2.8. Customer reserves the right to review the Deliverables immediately upon Scheduled Commencement and to request that the Company's makes further changes or adjustments; *provided* that any such requests are made to the Company within the first week after Scheduled Commencement. Customer will be charged for such changes or adjustments at the rate specified in the then-current price list.

2.9. The Company reserves the right to refuse, suspend or terminate Campaigns on editorial grounds or where any Customer Content is Nonconforming Content; provided that Company's acceptance of any Customer Content is not an endorsement by Company of such Customer Content or an approval indicating that no Nonconforming Content is contained therein; nor is it a waiver of Customer's obligation to ensure that no Customer Content will be Nonconforming Content.

2.10. Time is not of the essence of the agreement unless specifically agreed in writing by the Company.

3. ESTIMATES AND QUOTATIONS

3.1. Estimates will be provided by the Company to the Customer where the Customer's requirements are not capable of precise definition at that time. Such estimates shall impose no binding obligation on either party.

3.2. Quotations will be provided either upon receipt of a written specification from the Customer, or where as a result of meetings, correspondence or other communication, precise definition of the

required service can be produced by the Company and accepted by the Customer. Such specification shall form an integral part of the quotation.

3.3. Any Quotation submitted by the Company is without engagement on either party's part and no contract shall be made between the Company and a Customer unless, before the stated expiration date of the Quotation (and in any event no more than thirty(30) days after the date of the Quotation), Customer countersigns the Quotation and submits an Order hereunder specifically referring to and attaching the countersigned Quotation.

3.4. If a Quotation does not include specific provisions for the timing of the performance of the Company's obligations, the performance of the contract will be subject to available capacity and manpower.

3.5. Quotations are submitted by the Company on the basis that the whole work quoted for will be ordered. The price is based on information available to the Company on the date of the Quotation and may be adjusted in the event of any increase in costs between that date and the date of performance. The Company reserves the right to amend Quotations where typographical clerical or other errors have been made.

3.6. Unless otherwise stated Quotations will (a) exclude all taxes, including without limitation, sales taxes, and (b) be subject to Company inspection of all Customer Content.

3.7. The Company reserves the right to adjust its charges in accordance with Section 5.1.

4. PAYMENT

4.1. In consideration of the supply of the Deliverables and the performance of the Services in accordance with these Terms, the Customer shall pay the agreed price as set forth in the Quotation or in the Company's then-current price list.

4.2. Payment in full by Customer for Services and Deliverables will be required within 30 days of the date of the invoice unless otherwise agreed in writing. Full payment for all Aggregation Services must be made in advance of commencement of the Services.

4.3. Interest will be charged on outstanding amounts at a rate equal the lesser of 4% above the base lending rate of Citibank Bank or the highest rate allowed by law, in either case computed on a daily basis.

4.4. Company is entitled at its sole discretion to charge reasonable administration fees for handling overdue invoices.

4.5. Depending on the type of Campaign ordered and whether it has involved Media Creation Services, invoicing will generally be based on measures such as, but not limited to, number of contacts, deliveries or click-throughs in line with the Interactive Advertising Board standard.

4.6. The Company will provide the Customer with a Campaign report including, but not limited to, the number of contacts, deliveries or click-throughs. This report will be made available either online

through password-protected internet access, via fax or email or any other method as agreed from time to time.

4.7. Invoicing will occur after completion of a Campaign; provided that Company reserves the right to invoice monthly for Campaigns having a duration of more than 30 days.

4.8. If the Customer disputes any of the prices payable or costs invoiced by the Company then the Customer will settle by due date any such prices payable and charges that are not in dispute and will provide the Company with full details of any query or dispute within 30 days of receipt of the invoice to which it relates. The invoice will be accepted if no objection is made in writing within 30 days of receipt.

4.9. If a Campaign is not launched on the agreed time and date, the Company will use commercially reasonable efforts to fulfill the delivery of the Campaign within reasonable time thereafter, subject to approval by the Customer. Should such attempts fail, the Customer has the right to receive a refund for the undelivered part of the Campaign.

4.10. Payment shall be made in United States dollars either by check representing available funds made out to the Company, or by wire or other bank transfer. Other payment methods shall only be accepted upon written approval of the Company.

5. PRICE ADJUSTMENTS

5.1. The company reserves the right to adjust its published price list. Customers will be informed

via post, fax, or email of any price adjustments one month in advance of the effective date of any price change. If Customer objects in writing to the price adjustment within two (2) weeks after receipt, Company shall have the right to cancel any Order to which the price adjustment would have applied. Except as otherwise specified herein, price adjustments shall be effective upon the date announced in the adjustment notice.

6. DISCOUNTS AND AGENCY CONDITIONS

6.1 No discounts will be applied to the Advertising Services invoices unless expressly confirmed in writing by the Company.

7. INTELLECTUAL PROPERTY

7.1. All Intellectual Property Rights in the Customer Consent shall remain the property of the Customer or its licensors, as applicable.

7.2 The Customer grants, or shall procure the granting to the Company, its agents and sub-contractors a non-exclusive royalty-free license throughout the duration of each Campaign to display, copy, reformat, edit, alter, amend, adapt, electronically store, use, distribute and download the Customer Content or elements of the Customer Content to the extent necessary to allow the Company to meet its obligations hereunder.

7.3. Except as provided for by Section 7.1 all Intellectual Property Rights which have arisen or may arise in connection with the supply of the Deliverables and performance of the Services (including without limitation, in the advertising

formats, software, programs and associated documentation that is created by, on behalf of or in conjunction within the Company to fulfill an Order or requirement of the Customer) shall vest in the Company and Customer shall have no rights therein by estoppel, implied right or otherwise.

8. WARRANTIES

8.1. The Customer warrants and represents that:

8.1.1. it has full capacity and authority and all necessary consents to enter into and perform its obligations hereunder and that these Terms are entered into by a duly authorized representative of Customer;

8.1.2. the provision and use of the Customer Content and the exercise by or on behalf of the Company of the rights licensed by the Customer in Section 7 shall not infringe any Intellectual Property Rights of any third party;

8.1.3. No Customer Content will be Nonconforming Content.

8.2. The Company warrants and represents that:

8.2.1. it has full capacity and authority and all necessary consents to enter into and perform its obligations hereunder and that these Terms are entered into by a duly authorized representative of the Company; and

8.2.2. the Services will be supplied and rendered by appropriately experienced,

qualified and trained personnel with all reasonable skill, care and diligence; and

8.2.3. it shall discharge its obligations hereunder with reasonable skill, care, diligence and generally accepted industry practice.

9. EXCLUSION OF WARRANTIES

9.1. EXCEPT AS EXPRESSLY STATED IN THESE TERMS, ALL DELIVERABLES AND ALL SERVICES ARE PROVIDED "AS IS" AND WITHOUT ANY WARRANTY OF ANY KIND WHATSOEVER. THE COMPANY DISCLAIMS ALL WARRANTEES, EXPRESS, IMPLIED OR STATUTORY, INCLUDING, WITHOUT LIMITATION, THE WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NONINFRINGEMENT OF THIRD PARTY RIGHTS.

9.2. Customer recognizes that successful delivery of any Message depends upon, among other things, availability of networks and proper interaction of many network operators. Company's responsibility hereunder is to properly address each Message and submit it to a network operator for further transmission. No failure by such network operator or any subsequent network operator shall give rise to any claim hereunder.

10. LIMITATIONS OF LIABILITY AND INDEMNITY

10.1. Neither party excludes or limits liability to the other party for death or personal injury caused by its negligence.

10.2. The Company shall have no obligation, duty or liability whatsoever in contract, tort, (including negligence, breach or statutory duty and any other tort) or otherwise, except as otherwise expressly provided in these Terms.

10.3. NEITHER THE COMPANY NOR ANYONE ELSE INVOLVED IN CREATING, PRODUCING, DELIVERING OR TERMINATING THE USE OF ANY SERVICE OR DELIVERABLE SHALL BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR EXEMPLARY DAMAGES OF ANY KIND ARISING OUT OF OR RELATING TO THESE TERMS AND CONDITIONS OR USE OF THE SERVICE, OR DELIVERABLE OR INABILITY TO USE THE SERVICE, OR ARISING OUT OF BREACH OF ANY WARRANTY, INCLUDING BUT NOT LIMITED TO, LOST PROFITS OR REVENUE, BUSINESS INTERRUPTION OR LOSS OF BUSINESS INFORMATION, OR LOSS OF TECHNOLOGY RIGHTS, EVEN IF SUCH PERSON OR ENTITY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE COMPANY SHALL IN ADDITION HAVE NO RESPONSIBILITY OF ANY KIND FOR TRANSMISSION ERRORS IN, CORRUPTION OF, OR THE SECURITY OF CUSTOMER'S INFORMATION CARRIED OVER WIRELINE OR WIRELESS

TELECOMMUNICATIONS PROVIDERS' FACILITIES AND NETWORKS. THE COMPANY SHALL IN ADDITION HAVE NO RESPONSIBILITY FOR THE SELECTION, RETENTION, OR ACTS AND OMISSIONS OF, THIRD PARTIES IN CONNECTION WITH THE SERVICE, INCLUDING THOSE WITH WHOM THE COMPANY MAY CONTRACT TO OPERATE THE COMPANY SERVICE, REGARDLESS OF THE CAUSE OR THE FORM OF ACTION. THE COMPANY AGGREGATE MAXIMUM LIABILITY ARISING OUT OF OR RELATED TO THESE TERMS IN CONNECTION WITH ANY ORDER SHALL NOT EXCEED THE TOTAL AMOUNTS PAYABLE BY CUSTOMER THEREUNDER, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN.

10.4. Customer shall indemnify the Company its agents, contracting carriers and network operators and the officers and employees of each of them (collectively, the "Indemnified Parties") and hold the Indemnified Parties fully and effectively harmless from and against all costs, claims, demands, damages, liabilities, actions and proceedings, including reasonable attorneys' fees, made by any person or entity or governmental agency (a) arising out of or in connection with (1) any breach of these Terms by Customer, or (2) the provision or use of the Service by any person or (3) the conduct of Customer's business; or (b) arising out of any claim or proceeding brought against an indemnified Party alleging that Content supplied or transmitted hereunder (1)

infringes, misappropriates or interferes with the intellectual property rights of any third party, or (2) contains or consists of Nonconforming Content.

10.5. The Company has the right, but is not obliged to, check any Content to verify the adherence to the Terms. The Company has the right to refuse any Customer Content or terminate any Campaign or Order that is in breach of the Terms, current legislation, or good taste without notice to the Customer. The Company will notify the Customer of such action promptly upon taking such action. The Customer is bound to the agreed payment for the Campaign or Order, unless it can be proven that the Company has taken such action in bad faith. Any further claims for compensation or refunds are excluded.

10.6. If the Company's equipment, systems or programs or those of its subcontractors fail, the Company shall use its reasonable endeavors to restore the same to proper operating condition, but shall have no liability or other obligation in respect thereof.

10.7. If the Company makes an error in or omission of or from a Deliverable, it will correct this error as soon as reasonably practicable and without charge to the Customer for the correction. Additionally, the Company (at its own discretion) may reduce the charges for the Deliverable as is fair and reasonable having regard to the nature of the error or omission.

10.8. Company shall have no liability to the Customer or any other person for or in respect of any

Content, or instructions supplied by the Customer which are incomplete, incorrect, inaccurate, illegible, out of sequence or in the wrong form, or arising from their late arrival or non-arrival, or any other act or omission of the Customer.

11. CONFIDENTIALITY

11.1. Save as stated in Section 11.2 below, each party undertakes to the other that it shall:

11.1.1. use Confidential Information of the other party only for the purposes of carrying out duties and obligations under these Terms;

11.1.2. not disclose the other party's Confidential Information in whole or in part to any other person except where the disclosure is (i) with the other party's prior written consent; or (ii) is made in the proper performance of these Terms (iii) to its employees, contractors or agents who need access to such Confidential Information in order to perform such party's obligations under these Terms and who have each agreed to comply with this Section 11.

11.1.3. take all reasonable precautions to ensure that all Confidential Information is treated as confidential and is not disclosed or used other than for the purposes of these Terms.

11.2. The provisions of Section 11.1 shall not limit the use or disclosures of information which:

11.2.1. is or becomes public knowledge other than by breach of these Terms; or

11.2.2. has been or may be lawfully acquired from any third party owing no direct or

indirect obligation of confidentiality to the originally disclosing party hereunder; or

11.2.3. is independently developed without reference to the other party's Confidential Information.

11.3. If either party is obliged to disclose, in compliance with any applicable law, court or in accordance with the order of any administrative or regulatory body of competent jurisdiction, such disclosure shall be permitted hereunder, provided that the compelled party shall notify the other party as promptly as practicable and shall cooperate with such other party in its efforts to protect the confidentiality of the compelled disclosure.

11.4. The undertakings of confidentiality contained in this Section 11 shall survive for three years following expiration or termination of these Terms. Each party shall bear responsibility for breaches in this Section 11 by its employees, contractors and agents.

12. TERMINATION

12.1. The Company shall be entitled to terminate the agreement in the event of any breach by the Customer of any of its obligations under these Terms or failure to pay in accordance with the Terms or in the event of the appointment of a receiver or trustee over the whole or any part of the assets or of the undertaking of the Customer or in the event of a winding up, liquidation or dissolution of Customer or the entry of an order adjudicating the Customer bankrupt. The Customer shall not be entitled to terminate the

agreement without the written agreement of the Company.

12.2. in the event of any termination of any Order, Customer shall immediately pay to the Company any sums outstanding.

12.3. If the Customer wishes to cancel an Order less than one week prior to the launch date for the Campaign the full charges as outlined in the quotation shall become immediately payable.

12.4. In the event of termination of any Order, the provisions of Sections 1, 8, 9, 10, 11, 14, 15 and 16 shall survive the termination or the expiry.

13. FORCE MAJEURE

13.1. The Company shall not be liable to the Customer or be deemed to be in breach of the Contract by reason of any delay in performing, or any failure to perform, any of the Company's obligations in relation to the services, if the delay or failure was due to any cause beyond the Company's reasonable control. Without prejudice to the generality of the foregoing, the following shall be regarded as causes beyond the Company's reasonable control; Act of God, explosion, flood, fire or accident, war or threat of war, terrorism, sabotage, insurrection, civil disturbance or requisition, acts, restrictions, regulations, by-laws, prohibitions or measures of any kind on the part of any government, parliamentary or local authority; import or export regulations or embargoes; strikes, lock-outs or other industrial actions or trade disputes (whether involving employees of the Company or of a third party);

difficulties in obtaining raw materials, labor, parts or machinery; power failure or breakdown in machinery, such as telecom networks, computers and mobile phones.

14. PROTECTION OF PERSONAL DATA

14.1. If Database Services are used, Customer has no rights or claims to any information regarding Addresses or other information in such databases. All users registered within such databases have given their full permission to receive advertisements from the Company, as far as is reasonably demonstrable.

14.2 Each of Customer and Company warrants and undertakes that it shall comply with all laws and regulations in relation to the provision or use of the Services, Deliverables, Customer Content and Personal Data, and in particular but without limitation each party shall comply with the all data protection and privacy laws and regulations in all Applicable Jurisdictions and will cooperate with each other in their respective compliance efforts.

15. GOVERNING LAW

15.1. These terms and conditions and all other terms of the contract shall be governed and construed in accordance with the laws of New York, irrespective of its choice of law or conflict of law principles. Any dispute of any kind arising out of or relating to these Terms shall be brought exclusively in the state or federal courts sitting in New York. The United Nations Convention on

Contracts for the International Sale of Goods shall not apply to these Terms and Conditions.

15.2. The parties shall attempt in good faith to negotiate a settlement to any claim or dispute between them arising out of or in connection with these Terms. If the matter is not resolved by negotiation within 14 days of the claim or dispute arising (or such other period as may be agreed between the parties), the parties shall refer the dispute to a qualified independent mediator. If the parties fail to reach agreement in the mediation within 14 days of the mediator being appointed (or such other period as may be agreed between the parties), then any dispute or difference between them may be pursued in court; provided that nothing herein shall be construed to prevent either party from immediately pursuing equitable relief in court.

16. GENERAL CONDITIONS

16.1. No provision of or right under these Terms shall be deemed to have been waived by any act or acquiescence on the part of either party, its agents or employees, but only by an instrument in writing signed by an authorized officer of each party. No waiver by either party of any breach of these Terms by the other party shall be effective as to any other breach, whether of the same or any other term or condition and whether occurring before or after the date of such waiver. No variation to these Terms shall have any effect whatsoever unless agreed in writing by a duly authorized representative of the Company. No

employee or agent of the Company has authority to vary these Terms orally.

16.2. Each party represents that it is acting on its own behalf as an independent contractor and is not acting as an agent for or on behalf of any third party. These Terms and the relations hereby established by and between the parties do not constitute a partnership, joint venture, agency or contract of employment between them. There are no third party beneficiaries of these Terms.

16.3. All communications hereunder shall be in writing and shall be deemed to have been duly given upon receipt by the addressee at the addresses set forth in the Order, or such other address as either party may specify by notice sent in accordance with this Section.

16.4. In the event any provision of these Terms shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other term or provision hereof. The parties agree that they will negotiate in good faith or will permit a court or arbitrator to replace any provision hereof so held invalid, illegal or unenforceable with a valid provision which is as similar as possible in substance to the invalid, illegal or unenforceable provision.

16.5. In the event of any conflict or inconsistency between the terms and conditions hereof and any terms or conditions set forth in any purchase order or other document relating to the interactions contemplated by these Terms, the terms and conditions set forth herein shall prevail.

16.6. Captions of the sections and subsections of these Terms are for reference purposes only and do not constitute terms or conditions of these Terms and shall not limit or affect the terms and conditions hereof.

16.7. Words such as herein, hereinafter, hereof and hereunder refer to these Terms as a whole and not merely to a section or paragraph in which such words appear, unless the context otherwise requires. The singular shall include the plural, and each masculine, feminine and neuter reference shall include and refer also to the others, unless the context otherwise requires.

16.8. These Terms, together with each Order, contain the entire understanding of the parties hereto with respect to the transactions and matters contemplated hereby, supersede all prior agreements and understandings relating to the subject matter hereof, and no representations, inducements, promises or agreements, whether oral or otherwise, between such parties not contained herein or incorporated herein by reference shall be of any force or effect.

16.9. The parties agree that they have participated equally in the formation of the agreement that includes these Terms and that the language of these Terms shall not be presumptively construed against either of them.

16.10. Customer shall not be permitted to assign its rights or obligations hereunder whether in whole or in part without the prior written consent of the Company. The Company may assign its rights and obligations hereunder in whole or in part.

Status: October 12, 2005

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE GOMEZ, individually and on behalf of a class of similarly situated individuals, *Plaintiff,* v. CAMPBELL-EWALD COMPANY, a Delaware corporation, *Defendant.*	Case No. 10-cv-2007-DMG (CWx) **DECLARATION OF JOSE GOMEZ IN SUPPORT OF MOTION FOR CLASS CERTIFICATION** Honorable Dolly M. Gee Date: April 8, 2011 Time: 2:30 p.m. Ctrm: 7 (Spring Street)

DECLARATION OF JOSE GOMEZ

I, JOSE GOMEZ, hereby aver, pursuant to 28 U.S.C. § 1746, that I have personal knowledge of all matters set forth herein unless otherwise indicated, and would testify thereto if called as a witness in this matter.

1. I am an adult over the age of 18, and a resident of the State of Illinois. I am fully competent to make this Declaration, and make such Declaration. I am providing this declaration as the plaintiff in this case.

2. When I decided to file this lawsuit I understood that I had a responsibility and duty to act in the best interests of the other people who received unauthorized text messages like I did from the defendant or the companies it hired to send the messages.

3. Because of this obligation, I rejected defendant's individual offer to me that would not have provided others who received the messages the compensation the law provides for defendant's sending of unauthorized text messages.

4. Attached to this Declaration as Exhibit 1 is a copy of my 5/12/06 – 6/11/06 Cingular Wireless bill that I received from AT&T Mobility. On page 12 it shows that I received and was charged for a text message from shortcode "43704," which was the Navy text message identified in my lawsuit.

5. I never provided my consent to the defendant or anyone else to receive text message advertisements from the defendant or from the Navy.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on March 22, 2011.

/s/ Jose Gomez
Jose Gomez

mindmatics

[graphic omitted]

Full Service Mobile

Mobile **mindmatics**

Data Quality Control Process

- **During our Quality Control Process, each data partner needs to meet the following criteria:**
  - to have an opt-in/opt-out process in place
  - to push no more than one SMS per user per week
  - to opt-out users from program if it is requested by the user
- **Features**
  - manage data based on the MMA & DMA guidelines
  - handle number portability, device capability, cleansing and purge
  - create value around users by performing data matching/Appending
  - protect users from "WISPAM"
  - provide users with relevant content, offers and services

Opt-in/Opt-out Policy

- Users need to be properly opted-in through registration process and/or terms and conditions:
- The user can opt-out at any time from the web-site by accessing "My Account"
- The user can also opt-out during the campaign by replying "out", "quit", "leave" or "off"

SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS

* * *

2. CONTRACT No.
N00600-00-D-6048

* * *

6. SOLICITATION ISSUE DATE
14-Jul-2000

* * *

17 a. CONTRACTOR/ CODE . . .
OFFEROR
CAMPBELL-EWALD

* * *

CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS, FAR 52.212-4 (MAY 1999)

* * *

(q) Other compliances. The Contractor shall comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract.

* * *

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE GOMEZ, individually and on behalf of a class of similarly situated individuals, *Plaintiff,* v. CAMPBELL-EWALD COMPANY, a Delaware corporation, Defendant.	Case No. CV10-2007-DMG (CWx) Assigned to Hon. Dolly M. Gee **DECLARATION OF DANIEL RIOUX IN SUPPORT OF CAMPBELL-EWALD'S MOTION *FOR SUMMARY* JUDGMENT** Date: December 9, 2011 Time: 3:00 p.m. Ctrm: 7 (Spring Street)

I, DANIEL RIOUX, declare as follows:

1. I am a Director, Media Planning, at Campbell-Ewald Company ("C-E"). C-E is a global advertising agency that provides marketing services to clients throughout the United States, including the United States Navy. Except as otherwise indicated, I have personal knowledge of the following facts and, if called and sworn as a witness, could and would competently testify thereto.

2. As a Director, Media Planning, I am responsible for Navy Recruiting Command's paid media planning and buying for national advertising. I have been employed by C-E since October 1996 and began working exclusively on the United States Navy account in November 2002. I am responsible for C-E Media Department's relationship with the United States Navy.

3. C-E's contractual relationship with the United States Navy began in 2000. Through advertising and media initiatives authorized and approved by the United States Navy, C-E has helped the United States Navy achieve its annual and quarterly recruitment goals. As of June 2011, the United States Navy has met its active duty general enlisted recruitment goals for 126 consecutive months.

4. On or about September 21, 2005, C-E and Navy Recruiting Command ("NRC"), the United States Navy's recruitment arm, entered into a fee-based contract for advertising and media to support the United States Navy's recruitment efforts. The United States Navy requested that "Campbell-Ewald acquire additional media consisting of, but not limited to, television, radio, internet, etc. to increase Navy's share of voice, promote Navy brand awareness, and support

recruiting efforts." The Navy contract and documents relating to the contract are maintained in the ordinary course of business at C-E. A true and correct copy of the September 21, 2005 contract is attached as Exhibit 1.

5. On or about September 27, 2005, an amendment was issued to "provide additional media" and to "increase funds for work." A true and correct copy of this amendment, maintained in the ordinary course of business, is attached as Exhibit 2. On January 4, 2006, the contract was amended to provide additional media services and a larger budget pursuant to a revised media plan submitted by C-E and approved by NRC. A small component of the budget consisted of "wireless/mobile marketing." True and correct copies of this amendment and C-E's revised media plan, maintained in the ordinary course of business, are attached as Exhibits 3 and 4.

6. Given its young target audience, it is important to the United States Navy's recruiting goals to engage in exploratory or emerging media and to be at the forefront of new and innovative media forms, including media made possible through technological advancements. NRC shared this vision and objective with C-E and authorized funds specifically for the purpose of exploring new media opportunities. *See* "Exploratory Media" references in Exhibit 3 at page 2 and Exhibit 4. Text messaging was an emerging form of media in or about 2005.

7. On February 13, 2006, C-E issued a request for proposal in connection with the United States Navy's desire to engage in wireless advertising. The goal of the "Navy Recruiting Command's wireless strategy for 2006 [was] to generate leads" and to recruit "nearly

38,000" sailors. One of the options for which proposals were requested, the "Navy's current wireless best-practice," was a "Click-to-Call" campaign, which would "allow[] prospects to connect directly with [the United States Navy's] call center where required lead information is gathered and fed daily into the Navy's leads data base." A true and correct copy of C-E's request for proposal on behalf of the United States Navy is attached as Exhibit 5. Requests for proposals, such as the one prepared for the United States Navy, are prepared in the ordinary course of business at C-E.

8. In response to C-E's request for proposals, MindMatics LLC submitted proposals to C-E dated February 22, 2006 and April, 2006. True and correct copies of the proposals received from MindMatics in C-E's ordinary course of business describing MindMatics' proposed SMS text message campaign for the United States Navy are attached as Exhibits 6 and 7. I reviewed both of these proposals. In its proposals, MindMatics promoted itself as "the industry's leading full-service provider of mobile marketing and technology solutions with more than five years experience and over 3,000 mobile marketing campaigns conducted worldwide." Exhibit 6 at page 3 and Exhibit 7 at page 3. It recommended a "direct mobile marketing push program" that would "deliver to a mobile phone a marketing message via SMS text messaging." Exhibit 6 at page 3 and Exhibit 7 at page 3. MindMatics stated that "[e]ach [text] message will have an embedded phone number, which the recipient can easily use to call the Navy's call center" and "[e]very message delivered will be branded with the U.S. Navy's name." Exhibit 6 at page 3 and Exhibit 7 at page 3.

9. The proposed mobile marketing program from MindMatics stated that it would "deliver[] direct mobile marketing messages for clients directly to consumers' phones, utilizing MindMatics' managed mobile list." Exhibit 6 at page 3 and Exhibit 7 at page 3. MindMatics assured that its "list ha[d] over 12 million qualified, pre-opted-in mobile users (more than 3 million U.S.) who have requested that marketing offers be sent to them." Exhibit 6 at page 3 and Exhibit 7 at page 3. MindMatics also represented that it "strictly adhere[d] to [Mobile Marketing Association] standards to protect our clients and ensure the highest response rates." Exhibit 6 at page 3 and Exhibit 7 at page 3. MindMatics' proposal further provided that it would "develop and manage each mobile marketing campaign," provide its "carrier-grade infrastructure to facilitate the mobile marketing campaign," "schedule the messages for delivery," and would be "responsible for all necessary gateways, short-codes, and connectivity to deploy the programs[.]" Exhibit 6 at page 7 and Exhibit 7 at page 4.

10. On or about March 17, 2006, I presented a powerpoint presentation to the United States Navy that I principally authored entitled "Navy 2006 Wireless/Mobile Tactical Media Recommendations." I discussed each page of this presentation with Lee Buchschacher, C-E's primary contact at NRC, over the telephone. I had provided him a copy of the presentation by email prior to our telephone conference. Client presentations or "decks," as they are referred to at C-E, are prepared by C-E for its clients in the ordinary course of business. A true and correct copy of this March 17, 2006 deck prepared for and presented to the United States Navy is attached as

Exhibit 8. It outlined 2006 wireless/mobile media recommendations for the United States Navy's consideration and approval in accordance with the 2006 contract. In preparing the deck, I relied on the responses C-E had received to its February 2006 request for proposals for the United States Navy from third-party vendors, including MindMatics.

11. One of the options presented in the March 17, 2006 deck was MindMatics' text messaging proposal. The deck to the United States Navy specified that as part of this proposal, "MindMatics will deliver a Navy branded SMS (text) direct mobile marketing 'push' program to the cell phones of 150,000 Adults 18-24 from an opt-in list of over 3 million." *See* Exhibit 8 at 14. Because it was the United States Navy's campaign and would be branded with the United States Navy's name, C-E was required to "gain CNRC [Commander Navy Recruiting Command] approval to proceed" and to "gain final Navy approvals on creative executions." See Exhibit 8 at 19.

12. C-E obtained approval from NRC to proceed with MindMatics' text message proposal. To the best of my knowledge and belief, I obtained this approval from Mr. Buchschacher by telephone in late March or early April 2006. The United States Navy also had to approve the text message copy. A true and correct copy of the text message approved by Mr. Buchschacher, maintained in C-E's client files in the ordinary course of business, is attached as Exhibit 9.

13. Between May 10 and May 24, 2006, text messages were sent by MindMatics to potential Naval recruits between the ages of 18 and 24. C-E did not send the text messages. It did not dial the numbers or operate or maintain control over any automated dialing

equipment that placed the calls. C-E did not have the technology or capability of doing so. C-E never saw or took possession of the mobile numbers used for the United States Navy's May 2006 text message recruiting campaign. MindMatics handled the deployment, transmission and delivery of the text messages in accordance with its proposals, including the use of its own SMS short code. It alone had possession of the list of "over 12 million qualified, pre-opted-in mobile users (more than 3 million U.S.)" that was used to send the text messages. *See* Exhibit 7 at page 3. Attached as Exhibit 10 is a true and correct copy of an email from MindMatics sales representative Jordan Greene to me dated April 3, 2006 confirming that MindMatics "will scehdule [sic] your pushes, and send confirms when they are completed." C-E regularly maintains electronic mail in the ordinary course of business.

14. The May 2006 text message campaign was a United States Navy recruiting campaign. The text messages were sent to potential Naval recruits on behalf of the United States Navy and were sent solely in the United States Navy's interests and for its benefit. At all times, C-E was acting on behalf of the United States Navy at its direction, control, and oversight and for purposes of military recruitment.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 7th day of October, 2011, at Warren, Michigan.

/s/ Daniel Rioux

Daniel Rioux

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE GOMEZ, individually and on behalf of a class of similarly situated individuals, Plaintiff, v. CAMPBELL-EWALD COMPANY, a Delaware corporation, Defendant.	Case No. CV10-2007-DMG (CWx) Assigned to Hon. Dolly M. Gee **DECLARATION OF LEE BUCHSCHACHER IN SUPPORT OF CAMPBELL-EWALD'S MOTION FOR SUMMARY JUDGMENT** Date: December 9, 2011 Time: 3:00 p.m. Ctrm: 7 (Spring Street)

I, LEE BUCHSCHACHER, declare as follows:

1. I retired from employment with the U.S. Navy in April 2011 after 13 years of service with Navy Recruiting Command ("NRC"). The last position I held at NRC was Strategic Marketing Plans Officer in the Marketing, Advertising, & Public Affairs Division. As Strategic Marketing Plans Officer, I was responsible for reviewing and approving campaign proposals and coordinating campaigns with third parties and Campbell-Ewald Company ("C-E"), the Navy's advertising agent. In addition to my civilian employment, I served in the U.S. Marine Corps on active duty for 5 years reaching the rank of Staff Sergeant. I also actively served in the Army Reserve for 27 years and retired as Sergeant Major. In total, I devoted 41 years of service to the government of the United States. Except as otherwise indicated, I have personal knowledge of the following facts and, if called and sworn as a witness, could and would competently testify thereto.

2. NRC is the recruiting arm of the United States Navy whose sole mission is to recruit young men and woman to serve our country in the Navy. Recruitment is a primary objective of the Navy and is essential to the Navy's continued viability in this nation's military defense system. The Navy strives to meet annual and quarterly recruitment goals. These recruitment goals have ranged from 35,000 to 55,000 new general enlisted recruits per year over the last decade. The Navy strives to recruit, develop, and retain the best and brightest personnel our nation has to offer.

3. To help achieve its recruitment goals and spread the Navy's recruiting message, in 2000, NRC contracted with C-E to provide the Navy a full range of

marketing and media services, including print, radio, television, internet, and other media. C-E is the Navy's advertising agent of record and advertising plays a major role in the Navy's recruitment efforts. With C-E as its agent since 2000, the Navy has been able to meet or exceed its annual general enlisted active duty recruitment goals. A detailed summary of the Navy's recruitment goals and statistics is available on NRC's website located at http://www.cnrc.navy.mil/PAO/facts_stats.htm. A true and correct copy of a printout from this webpage dated September 15, 2011 is attached as Exhibit 1.

4. NRC maintains control and oversight over its campaigns and its agent, C-E. First, pursuant to the Navy's contract, C-E hosts an annual strategic conference for NRC at which time C-E presents a yearly plan for review, discussion and approval that is based on NRC's recruiting goals for the upcoming year and its stated needs. NRC has approximately 30 days to make modifications to the strategic plan presented. The NRC Rear Admiral must approve the plan for the year. In 2006, NRC Rear Admiral Jeffrey Fowler approved the 2006 strategic plan.

5. After the yearly strategic plan is approved, NRC oversees the campaigns. Each campaign requires NRC approval, oversight and review. NRC must approve the campaign as well as the copy or creative that bears the Navy name. There is daily monitoring of campaigns by NRC Program Advertising Managers as well as divisional oversight at NRC. NRC also monitors the results of its campaigns through regular communication with C-E. NRC is involved in other aspects as well, such as the preparation and approval of the media itself.

6. In December 2005, Daniel Rioux and his media staff presented NRC with a communications plan providing special project recommendations for media programs, a true and correct copy of which is attached as Exhibit 2. The recommendations contained in the plan had already been revised and/or approved by the NRC Rear Admiral. The plan contains an overview of various media plans, including print, out-of-home, emerging media, television, radio, magazines, tours and events, sponsorships, internet and exploratory media. Under "Exploratory Media" was an option for "Wireless/Mobile Marketing" to "Expand on Navy's Direct Response efforts via SMS [text messaging] and WAP [wireless application protocol]." *See* Exhibit 2 at 15. Consistent with NRC's policies and procedures, this document was provided to the Director of Advertising, Division Chiefs (including myself), Program Advertising Managers, and NRC Advertising Consultant. I received a copy of it and reviewed the plan along with my Program Advertising Managers and others, and approved it on behalf of NRC or the "CNRC [Navy Recruiting Command] technical clients," as it is referenced in the plan. *See* Exhibit 2 at 2. It was also reviewed by Fleet Industrial Supply Center (FISC), the government contracting office, which administers and oversees the Navy's contracts. FISC issued delivery orders necessary to fund the various campaigns. The plan was executed.

7. Given its young target audience, it is important to NRC's recruiting goals to engage in exploratory or emerging media and to be at the forefront of new and innovative media forms, including media made possible through technological advancements. NRC shared this vision and objective with C-E and authorized funds for

the purpose of exploring new media opportunities. *See* Exhibit 2 at 15. Text messaging was an emerging form of media in or about 2005.

8. On or about March 17, 2006, C-E presented a powerpoint presentation to NRC entitled "Navy 2006 Wireless/ Mobile Tactical Media Recommendations," which outlined "Exploratory Media" options consistent with the Navy's goals. I received a copy of this presentation. A true and correct copy of a March 20, 2006 email from NRC's primary contact at C-E, Daniel Rioux, in which I was copied, attaching this presentation is attached as Exhibit 3. The presentation offered 2006 wireless/mobile media recommendations for NRC's consideration and approval.

9. One of the media options presented was a text message proposal from MindMatics, LLC. The proposal stated that "MindMatics will deliver a Navy branded SMS (text) direct mobile 'push' program to the cell phones of 150,000 Adults 18-24 from an opt-in list of over 3 million." *See* Exhibit 3 at 14. This proposal needed to be approved by NRC since it would be sent on its behalf and branded with the Navy's name. C-E was required to "gain CNRC [Navy Recruiting Command] approval to proceed" and to "gain final Navy approvals on creative executions." *See* Exhibit 3 at 19.

10. In or about May 2006, the United States Navy undertook the text message campaign proposed by MindMatics to the mobile phones of potential recruits. It was a direct mobile program in which a recruiting message bearing the Navy's name was sent to the cell phones of U.S. adults between the ages of 18 and 24—the Navy's target recruiting audience. The text message included a "click-to-call" telephone number for

potential recruits to call the Navy's call center and receive a free Navy video. The Navy participated in the shooting of the video that was referenced in its text message to potential Naval recruits.

11. I was the primary contact from NRC for this text message campaign. During that time, I held the position of Deputy Director, Marketing and Advertising Plans Division. As Deputy Director, I was responsible for the supervision of the various Program Advertising Managers and the review, oversight and approval of Navy campaigns. Cornell Galloway, who was an Enlisted Program Advertising Manager at that time, and I worked closely with C-E on the Navy's May 2006 text message recruiting campaign, and provided Navy oversight and approval. The May 2006 text message campaign was a short and minor campaign part of a much larger strategic plan for the Navy in 2006.

12. Mr. Galloway and I authorized and approved the text message campaign proposed by MindMatics on behalf of NRC. I also reviewed, revised, and approved the creative for the Navy's text message. A true and correct copy of an email from C-E Assistant Account Executive Daidria Grayson to me dated April 27, 2006 providing the creative for my review and approval is attached as Exhibit 4. In an email dated April 28, 2006, I provided edits to the creative and approved the final text message. A true and correct copy of that email is attached as Exhibit 5. After consulting with others at NRC, I changed the phrase "Prove it in the Navy" to "Do it in the Navy" because the word "prove" is more closely aligned with the philosophy of the Marines.

13. I understand that C-E coordinated, on behalf of the Navy, with MindMatics to implement the Navy's

May 2006 text message recruiting campaign. The Navy did not have direct dealings with MindMatics. Mr. Galloway and I worked directly with our agent, C-E. I was aware that MindMatics would be responsible for the campaign's implementation, including sending the text messages to potential Naval recruits.

14. The May 2006 text message campaign was the Navy's, not C-E's, recruiting campaign. The text messages were sent to potential Naval recruits on behalf of the United States Navy and were sent solely in the Navy's interests and for its benefit.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 1st day of October 2011, at Millington, Tennessee.

/s/ Lee Buchschacher

Lee Buchschacher

[web site graphics and headers omitted]

Navy Recruiting Command
"RECRUIT QUALITY TODAY – BUILD FOR TOMORROW"

Public AffairsOffice

FY2011 Facts and Stats
Navy Recruiting Command ...
Seeking the 'Best and Brightest'
(Navy Recruiting mission runs on a fiscal year October through September)

Headquartered in Millington, Tennessee, NRC is located just north of Memphis on board Naval Support Activity Mid-South. Nationwide, Navy Recruiting covers the entire United States with twenty-six (26) Navy Recruiting Districts (NRDs) commanded by two (2) Navy Recruiting Regions. Today, nearly 7,000 active and reserve military, civilian and contract employees make up the command. Of those, more than 6,350 active and reserve officer and enlisted Sailors man more than 1,450 recruiting stations and centers throughout the U.S., Guam, Puerto Rico and Europe. You can see how widely dispersed Navy recruiting really is across the United States, and for most areas of the country, Navy recruiters are the only visible face of the Navy.

The number of active and reserve enlisted and officer production recruiters currently totals 4,603 (As of August 2011). This is the average daily number of field recruiters across the United States. Working out of their individual Navy Recruiting Station or NRS, these recruiters call on approximately 25,782 public and 6,177 private high schools nationwide.

Additionally, they access more than 2,750 two-year colleges and 2,490 four-year colleges. Approximately one hundred fifty-four NROTC units are located on U. S. college campuses.

Navy Recruiting Command's main objectives: First, increase the quality of the total force by aggressively seeking qualified Sailors in 71 total ratings in the active and reserve, with emphasis being placed on specific areas: Officer and Enlisted diversity, Medical officers, Chaplains, SEALs, Navy Special Warfare, Navy Special Operations, Special Warfare Combatant-Craft Crewmen, Explosive Ordnance Disposal, Diver, Hospital Corpsmen and Reserves. Second, in order to smooth the flow of recruits into boot camp, NRC maintains a healthy pool of young men and women in the Delayed Entry Program (DEP). Management and mentorship of the applicants in DEP is critical. Third, NRC continues to provide needed support to our great nation and Overseas Contingency Operations (OCO) demands by meeting the mission requirements for the other ratings that support NSW/NSO missions.

Even though the active enlisted mission is the largest mission number overall, the active enlisted goal is not the only goal NRC must reach. Reserve enlisted, as well as active and reserve officer missions, each present a different challenge.

FY06 Goals

Active duty enlisted – 36,656
Attained – 36,679 (100%+)
Reserve enlisted – 11,180
Attained – 9,722 (87%)

FY11 Goals

AC enlisted – 33,400
RC enlisted – 8,679
AC officer – 2,180
RC officer – 1,809
Total goal = 46,068

FY07 Goals

Active duty enlisted – 37,000
Attained – 37,361 (100%+)
Reserve enlisted – 10,602
Attained – 10,627 (100%+)
AC officer – 1571
RC officer – 2011
Total goal = 51,184

FY08 Goals

Active duty enlisted – 38,419
Attained – 38,485 (100%+)
Reserve enlisted – 9,122
Attained – 9,134 (100%+)
Active Duty officer – 1,962
Reserve officer – 1,200
Total goal = 50,703

FY09 Goals

Active duty enlisted – 35,500
Attained – 35,527 (100%+)
Reserve enlisted – 7,743
Attained – 7,793 (100%+)

Active duty officer – 2,202
Reserve officer – 1,198
Total goal = 46,819

FY10 Goals
Active duty enlisted – 34,140
Attained – 34,180 (100%+)
Reserve enlisted – 6,654
Attained – 6,669 (100%+)
Active duty officer – 2,403
Reserve officer – 1,600
Total goal = 44,797

NAVY RECRUITING ENLISTED ACTIVE GOALS/ACCESSIONS

FY	Goal	Accessions	End-Strength
2011	33,400		
2010	34,140	34,180	329,629
2009	35,500	35,527	330,621
2008	38,419	38,485	332,436
2007	37,000	37,361	338,735
2006	36,656	36,679	349,788
2005	37,635	37,704	365,900
2004	39,700	39,868	373,800
2003	41,359	41,376	382,235
2002	46,150	46,155	385,051

2001	53,520	53,690	377,810
2000	55,000	55,147	373,193
1999	52,524	52,595	373,046
1998	55,321	48,429	382,338
1997	50,135	50,135	395,564
1996	48,206	48,206	416,735
1995	48,637	48,637	434,617
1994	53,892	53,892	468,662
1993	63,073	63,073	509,950
1992	58,203	58,203	541,886
1991	68,311	68,311	570,262
1990	72,846	72,846	579,417
1989	95,186	95,186	592,652
1988	93,939	93,939	592,570
1987	92,909	92,909	586,842
1986	94,878	94,878	581,119
1985	87,593	87,593	570,705
1984	82,907	82,907	564,638
1983	82,790	82,790	557,573
1982	92,784	92,784	552,996
1981	104,312	104,312	540,219
1980	97,678	97,678	527,153

NAVY RECRUITING RESERVE ENLISTED GOALS/ACCESSIONS

FY	Goal	Accessions
2011	8,679	
2010	6,534	6,669
2009	7,743	7,793
2008	9,122	9,134
2007	10,602	10,627
2006	11,180	9,722
2005	11,491	9,788
2004	11,000	11,246
2003	12,000	12,772
2002	15,000	15,355
2001	15,250	15,344
2000	18,410	14,907
1999	20,455	15,240

Who We Recruit

Navy Recruiting is responsible for recruiting young men and women into the **Active Duty and Naval Reserve enlisted force.** We also recruit for **Officer Candidate School, Officer Indoctrination School** and process applications for **Naval Reserve Officer Training Corps.** Navy Recruiting does not recruit candidates for the Naval Academy.

NSW/NSO

Special emphasis is placed on specific NSW/NSO programs: SEALs, Navy Special Warfare, Navy Special Operations, Special Warfare Combatant-Craft Crewmen, Explosive Ordnance Disposal, Diver, Hospital Corpsmen and Reserves.

Diversity

Diversity is a strategic imperative for the United States Navy. Navy leadership has clearly articulated their commitment to a diverse Navy. **Improving diversity** within the Navy is not only the right thing to do; it is the smart thing to do. Increasing the number of minority officers and the Quality of minority Sailors in the Navy are critical elements for ensuring the productivity, growth, and success of this institution that we serve. **Greater diversity** enhances the Navy's flexibility and expands our collective problem-solving capabilities. We defend the greatest nation in the world. The strength of our diversity directly and irrefutably helps us do so. The Navy will stay committed to improving that strength.

Advertising

Our national brand and advertising campaign featuring the new slogan, **"America's Navy - A global force for good™,"** was launched in October 2009.

"Life Accelerator™." It allows a person to enter in personal preferences, likes and dislikes about career fields, which are then matched to the numerous opportunities in the Navy. We also pro·.ide a Spanish-language version of our recruiting Website, ELNAVY.COM. Both sites are designed to answer the questions of potential recruits and their families,

recognizing the need to include the family In enlistment decisions.

Quick Notes

The Navy is constantly seeking to enlist the best and brightest young men and women to succeed in today's high-tech Navy environment.

High school graduates have shown by their performance their success in establishing and achieving an academic goal, and are more likely to succeed in Navy programs where strong emphasis is put on individual educational development.

The Navy offers world travel and the long tradition of "Navy camaraderie" - forging strong friendships with "shipmates."

World-class Navy training and education gives Sailors highly marketable skills and puts them on the fast track to a bright future.

[contact information omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE DOLLY M. GEE, JUDGE
PRESIDING

JOSE GOMEZ, individually and on behalf of a class of similarly situated individuals,	)	No. 10-CV-2007-DMG
Plaintiffs,	)	
VS	)	
CAMPBELL-EWALD COMPANY,	)	
Defendant.	)	

Reporter's Transcript of Proceedings
Motion Hearing
Los Angeles, California
FRIDAY, MARCH 30, 2012

* * *

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COURT CLERK: Item 5. 10-2007-DMG. Jose Gomez versus Campbell-Ewald Company.

Counsel, state your appearances.

MR. McMORROW: Michael McMorrow for the plaintiff.

MR. MALLOW: Good afternoon, Your Honor. Michael Mallow, Loeb & Loeb, on behalf of the defendant.

MS. REILLY: Good morning, Your Honor. Christine Reilly for the defendant, Campbell-Ewald.

MS. WYTSMA: Laura Wytsma also on behalf of Campbell-Ewald.

MS. SILLER: Meredith Siller also on behalf of Campbell-Ewald.

THE COURT: Good afternoon, Counsel.

I don't have a written tentative for you today, but I do believe that this case will turn on whether or not there is derivative sovereign immunity. So, I'd like to ask counsel to focus their arguments on that issue today.

I'm going to give each side approximately 15 minutes to present their arguments. You can certainly use less than that if you wish.

So, since it's your motion, Mr. Mallow, or [4] Ms. Wytsma or Reilly, I'll allow you to go first.

MR. MALLOW: Thank you, Your Honor. Michael Mallow on behalf of the defendant, Campbell-Ewald.

Your Honor, in 45 pages the plaintiffs can try to plant a lot of trees to obscure the forest, and I think that's where we are in this case. So, if I may, what I'd like to try and do is, step back from the trees, take a good look at the forest; and then, I think after you take a look at the forest, you'll understand, Your Honor, why derivative sovereign immunity –

THE COURT: I think I kind of understood from the beginning, because I inserted a very strategic footnote into one of my Orders in which I sort of indicated that there had not been briefing on the subject. So, now I have received more briefing than I wished to have on the topic.

MR. MALLOW: Well, I'm glad that we did not miss the strategically placed footnote, Your Honor.

Your Honor, this case is about – it's not about a contractor that builds a building or that creates an aircraft. This is about a contractor who is hired and – to act as the Navy's agent to deliver, help the Navy deliver its message to the public, a message that conveys an image, a message that was intended to help the Navy perform one of its two primary functions: One is to protect the United States, and the second, and equally important, is to find people who [5] can help it to achieve that mission.

Your Honor, before you, on the Elmo is the, in fact, the text message that's at issue in this case. The text message tells you volumes about what C-E was retained by the Navy to do, and that's to communicate its recruiting message to the public. There is no commercial purpose for C-E in this. It is all about the Navy.

Now, in challenging derivative – let me step back a second.

It is uncontested that the Navy would not be liable under the TCPA if the Navy had performed all of the functions that are at issue in this case on its own.

If the Navy had drafted up the text message on its own, if the Navy had delivered the text message on its own, it is uncontested that the Navy would not be liable under the TCPA. And that's based on two

grounds: One is, the Navy is not a person as defined in the TCPA and sovereign immunity.

So, the question before Your Honor is: Can the fact that the Navy hired C-E to help it to create the message, to – and to deliver to the public, create liability where none exists. And the plaintiffs try to argue that C-E can be held liable under the TCPA, because it is not the Navy's agent. It is not working on behalf of the Navy. It is not performing the recruiting function.

[6] So, we have been focusing tremendous energy on this issue of "agency."

Now, I will tell you, Your Honor, under Yearsley and Ackerman, "agency" is not the issue. The issue is: Was C-E authorized to do what it did by the Navy, and did it work within the scope of that authorization? That's what's at issue. We spent a lot of time on "agency," but that's what's at issue. Now, we've addressed the "agency" issue because, in fact, the arguments, the facts support even that finding.

So, let's start with what the Navy says, itself.

In deposition, Lee Buchschacher, who worked for the Navy at the time that this text message was created and disseminated, testified – and this was part of the additional discovery that the plaintiffs requested subsequent to the filing of the motion for summary judgment.

Your Honor, before you on the Elmo is the quote from Mr. Buchschacher. It says: C-E doesn't do anything without the approval of the United States Navy recruiting command – or ^ somebody in it.

And that makes tremendous sense given the subject matter and given the tasks that C-E was requested to perform by the Navy. And what do I

mean by that? Your Honor, this is about the Navy. It's the Navy's name; it's [7] the Navy's message. Of course the Navy is going to control that with an iron fist. Anything that's done or said in its name impacts the Navy.

C-E corroborates what the Navy says, and deposition testimony taken after the motion for summary judgment was filed and pursuant to plaintiff's request for additional discovery. Mr. Auger says: In all instances, the commander, Navy and recruiting commands, holds the ultimately right of approval for all deliverables under the Navy contracts.

THE COURT: I don't think this is in the papers, or at least I didn't see it, but was there any "consciousness" at all at the time of this contracting relationship that there would be potentially any TCPA issues?

MR. MALLOW: Any "consciousness"? I'm not sure what Your Honor means by "consciousness."

THE COURT: Meaning that, was that a factor at all? Was it considered?

MR. MALLOW: I don't know if somebody said: Hey, let's worry about the TCPA. But we know that there was a request to have opt-in from those who were going to be contacted, probably more for public relations reasons than anything else.

And we also know that the Navy, you know, per the TCPA wouldn't be held liable for -- or is not subject to [8] the TCPA. So, I don't suspect that there was a legal analysis performed on whether the Navy's message violates the TCPA. I don't know if that answers Your Honor's question.

THE COURT: Sort of.

MR. MALLOW: Your Honor, in the Reply brief we set forth a number of specific items from the 2000-year based contract that reaffirms the control that the Navy had oversee and the messaging, any messaging that went out in the Navy's name and the Navy's message.

There has been some question in the record about whether the 2000 contract applies or the 2005 based contract applies. But as plaintiffs concede, essentially, the contracts are the same. So, indeed, that is not a, what I would call, material dispute, because whether you read the 2000 based contract or the 2005 based contract, the elements that are important for Your Honor's consideration are the same.

And what are those elements? The elements are the control aspects that the Navy has over the process that led to and culminated in the dissemination of the message at issue in this case.

THE COURT: Was the 2000 contract the very first contract, the beginning of the contractual relationship?

MR. MALLOW: It was, Your Honor.

So, what we have done, as opposed to the [9] plaintiff's purported expert, Mr. Nagle, we have identified a number of the areas that reenforce the control and authority that the Navy had over the messaging. And those are set out for you, before Your Honor: All creative work must -- is subject to review and approval by the Navy. All media plans, schedules, purchase and placement of advertisement and related approaches must be approved by the Navy. Performance of work will be subject to approaches outlined in the annual Navy recruiting strategic con -- plan and to input provided to by the CNRC, Navy recruiting command.

C-E's performance is going to be monitored. The COR, the Contracting Officer Represented, is responsible for monitoring for giving progress reports and overall technical surveillance, is responsibility – and must serve as the point of contact.

And in the contract you will see, Your Honor, that continuos contact, an intervention by the Navy, is required.

So, Your Honor, the list that I have in front of you on the Elmo is also in the Reply brief. So, I don't want to take up too much of the 15-minutes just going through what's already in the Reply brief, Your Honor.

But I do want to highlight that the contract is first and foremost the primary source to determine whether C-E had the authority to act on the Navy's behalf and whether [10] it did act on the Navy's behalf.

THE COURT: You can reverse some time for a rebuttal if you wish.

MR. MALLOW: I'd like to do that, Your Honor, but I don't see any of these little stop –

THE COURT: No, I don't use those.

MR. MALLOW: Okay.

THE COURT: You have about five minutes left.

MR. MALLOW: Okay. Let me go through it quickly, then, Your Honor.

Before you now on the Elmo is a flow chart, and it's the flow of how the text message came into existence and the Navy's involvement in the messaging.

First, a directive by the Navy: We want you to use New Media. We want you to be on the cutting edge. We want to reach the young audience, a young

audience that uses phones but uses text more than it uses the phones.

We want to be seen as a modern Navy.

This is all part of the Navy's directive and the message it wants to convey. It goes from the Navy directive to the idea of approving emerging media to using the text messaging to the actual text message to the timing of the campaign to the approval of MindMatics as a vendor to the revision of the advertise – of the copy to revisions of the copy to resumption of the campaign. As you know, the [11] campaign stopped for a brief moment.

Not coincidentally, Your Honor, if you look at the Gomez Complaint allegations, the operative allegations in the Gomez Complaint was all subject to Navy review and approval.

The fact that the text message went out and the content of the message, subject to Navy approval. The text message short code indicating the vendor, subject to Navy approval, and they approved it.

In all cases the Navy was involved. In all cases the Navy reviewed and approved.

So, then the question is: Is that enough? Under Yearsley, Your Honor, under Ackerman, that is enough. All C-E needs to establish is, that the acts that it performed were done pursuant to Navy authority, and that it worked within the scope of that authority.

What the plaintiff in his opposition has said is two things: One, C-E is not the Navy's agent. Doesn't have to be. But the facts of this case establish that, in fact, for the purposes of privilege analysis, C-E was the agent.

Plaintiffs offer Mr. Nagle whom, I submit to Your Honor, does not provide any reliable testimony to the court. Mr. Nagle focuses on one sentence of the contract, ignoring every single term in the contract that actually [12] talks about the oversight, supervision and authority that the Navy has over C-E and over the messaging of whatever nature that C-E submits and proposes to the Navy.

The other issue that the plaintiff has raised to the Court is one that, again, focuses on "agency" but tries to utilize the FTCA requirements to flash out what agency means.

Your Honor, you have to look closely at the FTCA definitions, because liability turns on whether somebody is an employee of the government. Because a contractor under the FTCA definitions is expressly exempted from the definition of "employee."

So, the level of control in assessing whether somebody is an employee or can be considered an employee, as you know, Your Honor, is far more demanding than a mere agent.

Based on derivative sovereign immunity, Your Honor, as well as the other grounds that are set forth in the C-E's motion for summary judgment, judgment on behalf of C-E as a matter of law is appropriate in this case, and we would request that.

THE COURT: All right, thank you.

Mr. McMorrow?

MR. McMORROW: Thank you, Your Honor.

Your Honor, there is -- you asked us to focus

* * *

[25]

* * *

Regardless of whether the appropriate test here that the Court wants to use is the Yearsley test, the-arm-of-the-state test or the Boyle test, under any of those tests, Campbell-Ewald clearly was well outside the scope of its authorization under the contract by sending text messages without authorization, by violating the TCPA, and by sending text messages to people who didn't want them and who were outside of the age range of recruitable people in the first place.

So, even under the Yearsley test that's urged by the defendants, the defendants still lose this motion.

THE COURT: All right. Thank you.

Mr. Mallow, you have three minutes to give me your parting shot.

MR. MALLOW: Well, Your Honor, I was hopping that beyond the parting shot, I can answer some questions that were left unanswered. So, let me run down some of the questions that Your Honor had to plaintiff's counsel, if I may, and then I can throw some parting thoughts if you might indulge me.

Your first question was: Does Doyle apply to the case, and the answer is, no, it does not.

THE COURT: You mean Boyle.

MR. MALLOW: Boyle. I'm sorry. I misspoke [26] before. It's Ackerson is the name of the case.

But the answer is: No, Boyle doesn't apply. C-E is not relying on Boyle. And in Ackerson, there was actually some discussion about Boyle, the divergence of Boyle and Ackerson, courts stated that the application of the contractor defense in the context of military equipment manufacturers is an area of law

that has since been arguably distinguished from the general Yearsley defense in Boyle Versus United Technology Corp and its progeny.

So, the answer to your question, Your Honor, is: Boyle heads to -- in one direction; Yearsley continues on in its own direction.

THE COURT: How do you respond to Mr. McMorrow's argument that there is a distinction even under Yearsley between the government explicitly instructing the contractor to do something versus the contractor coming up with a plan and then having the government approve it? What do you -- is there such a distinction?

MR. MALLOW: I am so glad you asked me that question. And, in fact, that's Item No. 3 on my list of questions to answer for Your Honor.

THE COURT: All right, I didn't mean to divert you from No. 2.

MR. MALLOW: I will jump to No. 3 since it is the topic of the moment.

[27] In fact, I disagree with counsel's reading of Yearsley. In the language -- and granted, Yearsley is a briefly worded case, which is quite refreshing; but the Court says there was, which is quite refreshing. But the court says: There was evidence tending to show that in extending the dike opposite petitioner's land, the contractor, apparently to keep and open an adequate channel for navigation between the end of the dike and the shore had accelerated the erosion by using the paddle wheels of its steamboats to increase the action of the current.

So, the Court's language focused on the contractor's decision to engage in that activity which hastened the erosion.

When the Court speaks of the authority and the purpose of the contracting task, it speaks in the general not in the specific.

So, when it talked about the application of the derivatives sovereign immunity doctrine, the case states: The Court of Appeals also found it to be undisputed that the work which the contractor had done in the river bed was all authorized and directed by the government of the United States for the purpose of improving navigation of this navigable river.

So, my reading of the case language is, the contractor was working under the broad scope of the [28] authority; but the specific decision to use the paddle boats to hasten the erosion was the contractor's decision not the government's specific decision.

So, there is nothing in Yearsley expressly saying that the government must micromanage the activities of the contractor who was seeking to be protected by derivative sovereign immunity, only the broad authorization is required.

THE COURT: What about the proposition that an agent's violation of the law always causes them to be liable for their own acts?

MR. MALLOW: Your Honor, I'm so glad you asked me that question. That is No. 4 on my list. The answer is: Yes, there is language that exempts out, that would prevent a contractor from using derivative sovereign immunity if it, in fact, violated law and exceeded its authority.

And, interestingly, if you read Ackerson, if you read Pika (phonetically spelled), and I'm sure you have, so, I don't mean it in that way, but when you read Ackerson and when you read Pika, both of the plaintiffs

in that case raise a very similar argument to what plaintiff's counsel is raising here.

I would answer it this way: The plaintiff's argument is quite circular. What the plaintiffs have said is: C-E, you know, violated the statute, the TCPA. C-E says it enjoys derivative immunity. But it really doesn't derive [29] derivative immunity because C-E violated the statute.

The question is: In exercising its authority, did -- was there a violation of the TCPA? And the Navy is not liable under the TCPA. The act that occurred is not the Navy's message, is not subject to the TCPA.

So, the fact that C-E proposed the message subject to the Navy's authority and approval, and it was disseminated, it didn't violate the TCPA when the Navy did it; and, therefore, to argued that C-E violated the contract because somehow it violated the TCPA independently of the government, makes no sense. It's a circular argument.

And if it was an argument that was acceptable, the mere allegation of a violation would defeat derivative sovereign immunity in all cases. And Ackerson, in that case, the Court rejected the plaintiff's request to discovery and rejected the plaintiff's requesting to amend the Complaint to allege a violation, very similar to the circular nature that plaintiffs are trying to do here, because they said it would be a futile act.

So, no, C-E did not exceed its authority, because the Navy did not violate the TCPA, Navy's message didn't violate the TCPA.

THE COURT: All right, your time is just about up.

MR. MALLOW: Your Honor, I would add -- you had asked the question of plaintiff's counsel whether

the [30] activities that were engaged on, engaged in by C-E constituted recruiting. In the 2000 base contract, it says, on page 18 of 43, the Navy's recruiting advertising program for fiscal year 2001 is directed toward the recruitment of approximately 60,095 personnel to fill vacancies in both enlisted and officer programs.

The 2006 contract – I'm sorry, 2005 contract, similarly says: The Navy's recruiting advertising program is directed toward the recruitment of personnel to fill vacancies and enlisted and office programs for both the active and reverse components.

So, there is no question that the advertisement program was recruiting.

There was some discussion back and forth about the opt-in requirements that C-E had proposed to the Navy. Your Honor, the record is undisputed: MindMatics represented to C-E and the Navy that they were only using double opt-in data. That was the representation by MindMatics.

What the plaintiffs would have the Court believe is, that the Navy and C-E were obligated to somehow challenge the representations that were made by MindMatics based on MindMatics' database, based on the information MindMatics had. There is no requirements under the contract or otherwise that either the Navy or C-E challenged the [31] representation that was made by MindMatics.

Last word, Your Honor. We're talking about derivative sovereign immunity, but the concept of *privilege* merges with that. And I want to leave you with a quote from Pika (phonetically spelled): Pika contents that the principals of agency do not shield ONW in this case. We disagree. Primarily because

such a conclusion ignores the Hornbook "agency" principal that: If a principal cannot be held liable for performing an act neither can the agent from the principal director to perform the act even if the agent would have been liable in the absence of such.

That's this case, Your Honor. The Navy wasn't liable. We're not leaving people without remedy, because there was no violation. And the motion – and C-E's motion for summary judgment should be granted.

Thank you, Your Honor.

THE COURT: Thank you. The motion will stand submitted.

(Court adjourned.)

Supreme Court, U.S.
FILED

JUL 16 2015

OFFICE OF THE CLERK

No. 14-857

In the Supreme Court of the United States

CAMPBELL-EWALD COMPANY,
Petitioner,

v.

JOSE GOMEZ,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim.

2. Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified.

3. Whether the doctrine of derivative sovereign immunity recognized in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), for government contractors is restricted to claims arising out of property damage caused by public works projects.

RULE 29.6 STATEMENT

Petitioner Campbell-Ewald Company is a wholly-owned subsidiary of The Interpublic Group of Companies, Inc. No other person or publicly held corporation owns 10% or more of the stock of Campbell-Ewald Company.

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JURISDICTION

The court of appeals entered judgment on September 19, 2014. Pet. App. 1a-2a. On December 8, 2014, Justice Kennedy granted a timely application to extend the time within which to file a petition for certiorari to January 19, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, of the U.S. Constitution and pertinent provisions of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, are set forth in the Petition Appendix at 64a-68a.

INTRODUCTION

The armed services are one of government's most vital assets, and recruiting is one of the armed services' most important missions. The U.S. Navy engaged the petitioner in this case, Campbell-Ewald, to assist the Navy in harnessing 21st century communications technology, including mobile marketing and text messaging, to advance the Navy's critical recruiting mission. The Navy engaged Campbell Ewald to act on its behalf, and the Navy, in turn, oversaw and approved Campbell-Ewald's work. As the Navy's

representative put it, "Campbell-Ewald doesn't do anything without the approval of the United States Navy Recruiting Command or somebody in it." JA 47.

As part of this campaign, the Navy sent the following text message to thousands of individuals on an "opt-in" list prepared by a third party (MindMatics LLC), whose hiring the Navy also approved:

> Destined for something big? Do it in the Navy. Get a career. An education. And a chance to serve a greater cause. For a FREE Navy video call [number].

Pet. App. 2a. Plaintiff claims he never consented to receive the message. Instead of brushing it off, he filed a class action lawsuit under the Telephone Consumer Protection Act of 1991 (TCPA), seeking hundreds of millions of dollars on behalf of himself and a putative nationwide class of "other unconsenting recipients of the Navy's recruiting text messages." *Id.* at 3a. But since the Navy itself indisputably is not amenable to such an action, he sued Campbell-Ewald instead.

Before any class was certified, and before Plaintiff had even moved for class certification, Campbell-Ewald sought to resolve the matter by simply making Plaintiff an offer of complete relief on his TCPA claim—including an offer of "prompt payment" of $1503, more than three times the statutory damages for an unsolicited text. Pet. App. 58a-59a. Plaintiff refused to accept Campbell-Ewald's tender and, instead, insisted that he was entitled to litigate the class action.

This case presents two overarching issues. First, whether Campbell-Ewald's offer to give Plaintiff all the relief he could secure from a judgment in his favor before any class was certified eliminates any justiciable controversy as to both Plaintiff's individual claim and

his class claim. And second, if this case is justiciable, whether Campbell-Ewald enjoys derivative sovereign immunity from suit, since it is undisputed that Plaintiff could not have sued the Navy if it had carried out the text messaging campaign itself and the Navy directly oversaw and approved Campbell-Ewald's work. The Ninth Circuit answered both questions in the negative and ordered that the action should proceed.

STATEMENT OF THE CASE

A. Statutory Background

The TCPA prohibits any "person" from making a "call" using an automated dialing system to any mobile telephone number, except in cases of emergency or with the consent of the "called party." 47 U.S.C. § 227(b)(1). "Person" includes any "individual, partnership, association, joint-stock company, trust, or corporation." *Id.* § 153(39). The Act provides such persons with a right of action to recover $500 per violation, which may be trebled for knowing or willful violations. *See id.* § 227(b)(3)(B).

Congress passed the TCPA in response to consumers' complaints concerning the "'proliferation of . [telemarketing] calls.'" *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012) (quotation omitted)). Senator Hollings, the TCPA's sponsor, sought to provide consumers with a right of action "'in State court . . . , preferably in small cla ms court.'" *Id.* at 752 (quoting 137 Cong. Rec. 30,821 (1991)). He hoped that the bill would "'allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purpose of the bill if the attorneys' costs to consumers

of bringing an action were greater than the potential damages.'" *Id.* (quoting 137 Cong. Rec. at 30,821-22). In the years since, the TCPA has mushroomed into a litigation juggernaut that scarcely could have been foreseen by the Congress that passed it.

Today a "cottage industry of attorneys" is responsible for a rising tide of class action suits under the TCPA, turning an unwanted message into the potential for an attorney's fee or settlement bonanza.[1] TCPA class actions have extracted multi-million dollar settlements from banks, credit agencies, universities, and other leading companies, but more often than not the winners are the class action lawyers instead of the recipients of unwanted messages. In 2014, for example, the average consumer received about $4 from a TCPA class-action settlement, while plaintiffs' lawyers averaged about $2.4 million. *See* Adonis Hoffman, *Sorry, Wrong Number, Now Pay Up*, Wall St. J., June 15, 2015; *see also* U.S. Chamber Institute for Legal Reform, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages* 4 (2013).

B. Plaintiff's Lawsuit

Founded in 1911, Campbell-Ewald is one of the nation's leading communications and marketing

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[1] Yuri R. Linetsky, *Protection of "Innocent Lawbreakers": Striking the Right Balance in the Private Enforcement of the Anti "Junk Fax" Provisions of the Telephone Consumer Protection Act*, 90 Neb. L. Rev. 70, 74 (2011); *see also* Paul F. Corcoran et al., *The Telephone Consumer Protection Act: Privacy Legislation Gone Awry?*, 10 Intell. Prop. & Tech. L.J. 9, 9, (2014) (noting dramatic increase of TCPA class actions in recent years).

companies. In 2006, as part of an ongoing contract with the Navy, the Navy directed Campbell-Ewald to develop a mobile marketing campaign using emerging forms of technology to increase awareness of the Navy and to encourage potential recruits to contact the Navy or visit its websites. *See* JA 84-88, 169-75; *see also* C.A.E.R. 557, 561-67, 671-72, 722-66. The contract expressly provided for the Navy's oversight of Campbell-Ewald's work and required the Navy to approve all deliverables provided by Campbell-Ewald. JA 91; *see also* C.A.E.R. 696, 699-704, 718-19. The contract also provided that Campbell-Ewald could use subcontractors to execute its responsibilities. JA 87-88, 116-17. During the performance of the contract, the Navy was "in constant contact with Campbell-Ewald on a daily basis" for input or approval. *Id.* at 47.

After the Navy authorized funding to explore new media opportunities for the campaign, including text messaging, Campbell-Ewald submitted a proposed media plan that included an effort to expand the Navy's outreach via text messaging. JA 176-82, 232-34; *see also* C.A.E.R. 400-04, 625, 759-64, 766. The Navy "liked the idea of contacting people via text message" and approved the plan. JA 34. To execute this plan, Campbell-Ewald contracted with a separate company, MindMatics LLC, to deliver the "'Navy branded SMS (text) direct mobile "push" program to the cell phones of 150,000 Adults 18–24 from an opt-in list of over 3 million.'" Pet. App. 25a (citation omitted); *see* JA 182, 186; C.A.E.R. 408. MindMatics was responsible for compiling the opt-in list of recipients and actually sending the text messages. JA 183-89.

Together, Campbell-Ewald and the Navy developed the "Destined for something big?" text message—

quoted above—that led to this lawsuit. *See id.* at 226, 232-33. The Navy revised and specifically approved the content of the message. *Id.* at 41, 72. MindMatics "handled the deployment, transmission and delivery of the text messages" based on an opt-in list for mobile numbers that MindMatics (alone) developed. Pet. App. 26a; *see* JA 227; C.A.E.R. 412. The Navy was specifically informed that MindMatics was responsible for the opt-in list, JA 179, 182, 185, 226, 232-33, and the Navy authorized MindMatics to send the text messages. *Id.* at 72-74, 51-52, 232-33.

Plaintiff claims that he received this text message in May 2006 as part of the Navy's recruitment campaign, and that he never consented to receive it. Pet. App. 3a, 36a. Three years and ten months later, Plaintiff filed an action under the TCPA against Campbell-Ewald—but not the Navy or MindMatics. *Id.* at 2a-3a; *see* JA 16-24. In addition, Plaintiff sought to represent a putative nationwide class of "other unconsenting recipients of the Navy's recruiting messages" under Federal Rule of Civil Procedure 23. Pet. App. 3a. Plaintiff's complaint sought damages for the alleged TCPA violation on an individual and class-wide basis, all told seeking hundreds of millions of dollars. *Id.* at 2a, 22a; *see* JA 16-24.

C. Campbell-Ewald's Offers Of Complete Relief And District Court Proceedings

Before any class was certified and before Plaintiff even moved for certification, Campbell-Ewald made an offer of judgment pursuant to Federal Rule of Civil Procedure 68 (Pet. App. 52a-56a) as well as a separate tender (*id.* at 57a-61a) that afforded Plaintiff complete relief on his TCPA claim. The offers provided for (1) the payment of $1503 for each unsolicited text message

that Plaintiff allegedly received (more than three times the statutory amount of $500 per violation); (2) the payment of all reasonable costs that Plaintiff would recover if he were to prevail; and (3) the stipulation to an injunction prohibiting Campbell-Ewald from engaging in the alleged wrongs. The offers made explicit that Campbell-Ewald would "arrange for prompt payment." *Id.* at 38a-39a, 52a-61a.

Plaintiff did not accept these offers. *Id.* at 3a. Instead, he filed a motion to strike the Rule 68 offer and a motion for class certification. *Id.* at 39a. Campbell-Ewald moved to dismiss the action for lack of jurisdiction, arguing that its offers of complete relief mooted both Plaintiff's individual and class claims under basic Article III principles. *Id.* at 39a-41a.

The district court denied Campbell-Ewald's motion. *Id.* at 35a. The court found that Campbell-Ewald's offers would have "fully satisfied" Plaintiff's claim. *Id.* at 40a. But the court believed that Plaintiff's motion for class certification (filed after Campbell-Ewald's offers of full relief) could "relat[e] back" to the filing of the class complaint (before Campbell-Ewald had made its offers of complete relief). *Id.* at 47a-49a.

After a period of discovery, Campbell-Ewald moved for summary judgment, arguing, *inter alia*, that it was entitled to derivative sovereign immunity. Campbell-Ewald explained that, under this Court's decision in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), it could not be held liable for an alleged TCPA violation for which the Navy itself could not be held liable, given that Campbell-Ewald was simply carrying out validly conferred authority under a contract with the Navy and that the Navy closely supervised and approved Campbell-Ewald's actions in carrying out the

contract. Pet. App. 30a. The district court granted Campbell-Ewald's motion. *Id.* at 33a-34a.

The district court explained that it is undisputed that "the Navy cannot be sued for violation of the TCPA" because the United States has not waived its sovereign immunity from suit under the TCPA. *Id.* at 30a. In addition, the court found that Plaintiff "points to no evidence indicating that [Campbell-Ewald] exceeded the scope of its authority to send the text message at issue." *Id.* at 32a. To the contrary, the court explained, the "undisputed" facts show that "[Campbell-Ewald] acted at the Navy's direction to effectuate [the] text message recruitment campaign." *Id.* at 33a. Accordingly, the court concluded that, "[a]cting as a Navy contractor, [Campbell-Ewald] is immune from liability under the doctrine of derivative sovereign immunity." *Id.* at 33a-34a.

D. Ninth Circuit Proceedings

A month after Plaintiff appealed the grant of summary judgment, this Court decided *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), in which it held that an unaccepted offer of full relief mooted a collective action under the Fair Labor Standards Act (FLSA). The Court held that, under the "straightforward application of well-settled mootness principles," a collective FLSA action becomes moot when the plaintiff's individual claim becomes moot "because [the plaintiff] lack[s] any personal interest in representing others in this action." *Id.* at 1529.

Campbell-Ewald then moved to dismiss Plaintiff's appeal for lack of jurisdiction. C-E Mot. 2 (9th Cir. June 24, 2013), ECF No. 8. As Campbell-Ewald explained (*id.* at 14), *Genesis Healthcare* corrected the

reasoning of prior Ninth Circuit precedent—such as *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011)—holding that an offer of complete relief did not moot a class claim. The Ninth Circuit denied Campbell-Ewald's motion without prejudice to renewing the arguments in its answering brief. Order (Aug. 20, 2013), ECF No. 17.

In September 2014, the Ninth Circuit reversed the district court's grant of summary judgment for Campbell-Ewald. Starting with Campbell-Ewald's jurisdictional arguments, the court held that neither Plaintiff's individual claim nor the class claim was mooted by Campbell-Ewald's offers of complete relief. Pet. App. 4a-7a. Following the dissent in *Genesis Healthcare* and the Ninth Circuit's own decisions in *Pitts* and *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948 (9th Cir. 2013), the court reasoned that an *unaccepted* offer that would fully satisfy a plaintiff's claim is insufficient to render either an individual or class claim moot. Pet. App. 5a.

On the merits, the Ninth Circuit held that this Court's decision in *Yearsley* is "not applicable." *Id.* at 15a. The court reasoned that *Yearsley* established only "a narrow rule regarding claims arising out of property damage caused by public works projects." *Id.* In addition, the court observed that "[the Ninth Circuit], in particular, has rarely allowed use of the defense, and only in the context of property damage resulting from public works projects." *Id.* at 16a. According to the court, there was thus no basis for applying "the [derivative sovereign immunity] doctrine to the present dispute." *Id.* at 16a-17a. The court disposed of Campbell-Ewald's remaining arguments and remanded for further proceedings. *Id.* at 20a.

This Court granted certiorari.

SUMMARY OF ARGUMENT

I. The Ninth Circuit's holding that this lawsuit should proceed despite Campbell-Ewald's offer of complete relief contravenes Article III of the Constitution and this Court's precedents. Article III's case-or-controversy requirement demands adversity between the parties and a plaintiff with a personal stake in the outcome of the case at all times. In this case, Plaintiff's complaint sought relief for an alleged violation of the TCPA based on receipt of a text message. Campbell-Ewald responded by making an offer of judgment and a separate offer that—as the district court found—would have "fully satisfied" Plaintiff's individual claim. Pet. App. 40a. That offer and tender ended a justiciable controversy.

Offering a plaintiff everything he could secure through a judgment in his favor eliminates both the requisite adversity and personal stake, and thus eliminates an Article III case and controversy. As this Court long ago recognized, a plaintiff's refusal to accept such a tender does not compel a different conclusion. *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 313-14 (1893). Article III is neither enlarged nor limited by contract law principles, and courts are not empowered to expound on the law when a defendant has already offered a plaintiff the result he seeks. Once a court has determined that a defendant's tender is for complete relief—as the district court did here—the case should be dismissed as moot. But a court also has authority to dispose of the case by entering judgment according to the defendant's offer of complete relief.

The presence of a class claim does not remedy that jurisdictional defect. A class only acquires a separate legal status if and when the class has been certified by the district court. Because Campbell-Ewald made its tender of complete relief before any class was certified and, indeed, before Plaintiff had even moved for certification, Plaintiff's class claim became moot when his individual claim did. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1531 (2013), repudiates the Ninth Circuit's rationale that policy concerns about purportedly "picking off" named plaintiffs before a class is certified justify an exception to this rule. And *Genesis Healthcare*'s reasoning applies equally here: a named plaintiff who asserts potential claims of an uncertified class under Rule 23 occupies no better position than an FLSA plaintiff who asserts a collective action before other claimants have opted in.

II. If this case is nevertheless justiciable, Campbell-Ewald is entitled to derivative sovereign immunity. This Court long ago recognized that where the government authorizes a contractor to act on its behalf and under its supervision, there is no liability on the part of the contractor for executing the government's will. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 22 (1940). That rule accords with this Court's repeated recognition that those acting on behalf of the government are entitled to common law immunity regardless of whether they are full-time employees or private contractors. *See, e.g., Filarsky v. Delia*, 132 S. Ct. 1657, 1663-65 (2012). Denying immunity to those who carry out the government's work—whether individuals or entities, or contractors or employees—would frustrate the important principles that compel granting immunity to the sovereign itself.

The Ninth Circuit erred in holding that the availability of such immunity is limited only to "claims arising out of property damage caused by public works projects." Pet. App. 15a. *Yearsley* did not limit immunity to "public works projects," and any such limitation would be entirely artificial. As this Court has repeatedly held, immunity principles should be applied consistent with the policies that inform them. Limiting immunity to "public works projects" would frustrate those policy interests, including the interest in not shifting the costs of liability to the United States.

The district court properly held that Campbell-Ewald is entitled to derivative sovereign immunity. Campbell-Ewald indisputably was acting on behalf of the Navy in undertaking the recruiting campaign giving rise to the text message at issue. It did so in pursuit of a vital government objective—military recruiting. And the text message campaign targeted by Plaintiff was developed by Campbell-Ewald, working closely with and under the direct supervision of Naval Recruiting Command, and was specifically approved by Naval officers. If a Naval officer had done everything that Campbell-Ewald is alleged to have done, he would enjoy immunity from this suit. There is no basis to reach any different conclusion with respect to the private communications expert that the Navy engaged to carry out the same actions.

The Ninth Circuit's decision should be reversed.

ARGUMENT

I. A CASE OR CONTROVERSY BECOMES ACADEMIC, AND THUS BEYOND THE SCOPE OF ARTICLE III, WHEN A DEFENDANT OFFERS A PLAINTIFF COMPLETE RELIEF ON HIS CLAIM

As this Court has stressed, "'no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citation omitted). The Ninth Circuit contravened that fundamental limitation when it held that this case should proceed notwithstanding that Campbell-Ewald had offered Plaintiff all the relief he could secure through a judgment in his favor.

A. Article III Jurisdiction Is Limited To Genuine "Cases" And "Controversies"

Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. This Court has long viewed these "complementary" terms as "limit[ing] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968). That limitation requires "an actual controversy, and adverse interests." *Lord v. Veazie*, 49 U.S. (8 How.) 251, 255 (1850); *see Muskrat v. United States*, 219 U.S. 346, 357 (1911) (quoting *In re Pacific Ry. Comm'n*, 32 F 241, 255 (C.C.N.D. Cal. 1887) (Field, J.)); *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892).

"A justiciable controversy is . . distinguished from a difference or dispute of a hypothetical or abstract character, from one that is academic or moot." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). Thus, as the Court has held, federal courts are "not empowered to decide moot questions or abstract propositions, or to declare . . . principles or rules of law which cannot affect the *result* as to the thing in issue in the case before it." *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 314 (1893) (emphasis added).[2]

The adversity requirement demands that a plaintiff personally "possess[] a legally cognizable interest, or 'personal stake' in the outcome of the action." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013) (citations omitted); *see Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976) ("[T]he plaintiff who seeks to invoke judicial power" under Article III must "stand to profit in some personal interest . . . ."). This "personal stake in the outcome of the controversy" is necessary "'to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends.'" *Flast*, 392 U.S. at 99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Moreover, this requirement ensures that there

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[2] The Court's focus on whether the courts are empowered to adjudicate issues that "cannot affect *the result* as to the thing in issue" (*San Pablo*, 149 U.S. at 314 (emphasis added)) squares with Article III's "case" requirement. A "case," after all, is "a formal cause of action demanding *a remedy* for the claimed violation of a legal right." Robert J. Pushaw Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 Notre Dame L. Rev. 447, 472-73 & n.134 (1994) (emphasis added).

is "'a *real need* to exercise the power of judicial review in order to protect the interests of the complaining party.'" *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (emphasis added) (citation omitted).

When the requisite adversity and personal stake are lacking, a dispute is academic and any decision purporting to resolve it would amount to an advisory opinion. *See, e.g.*, *Flast*, 392 U.S. at 96-97 ("[T]he rule against advisory opinions . . . recognizes that such suits often 'are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests.'" (quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961)). Accordingly, this Court has been emphatic that, "[i]f a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler*, 547 U.S. at 341.

As the Court reiterated in *Genesis Healthcare*, "[a] corollary to this case-or-controversy requirement is that an actual controversy must be extant at *all stages* of review, not merely at the time the complaint is filed." 133 S. Ct. at 1528 (emphasis added) (internal quotation marks and citations omitted). Thus, a "plaintiff's personal stake in the litigation [must] continue throughout the entirety of the litigation," *Sosna v. Iowa*, 419 U.S. 393, 402 (1975), or else the action becomes moot. "If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed . . . ." *Genesis Healthcare*, 133 S. Ct. at 1528 (citations omitted).

B. When, As Here, A Plaintiff Has Been Offered Everything He Could Obtain Through A Judgment In His Favor, The Requisite Adversity And Personal Stake Are Lacking

When a plaintiff has been offered all the relief that he has sought, the requisite case or controversy is lacking, no matter how badly a plaintiff might wish to proceed with the litigation and have the courts expound on the law or any underlying issue.

1. As this Court's precedents have reiterated, the very purpose of an Article III case or controversy is to secure a *remedy* for the claimed violation of a legal right; it is not to obtain a legal ruling for its own sake. *E.g.*, *Muskrat*, 219 U.S. at 357; note 2, *supra*. When a defendant has effectively "thrown in the towel" (*Chathas v. Local 134 Int'l Bhd. of Elec. Workers*, 233 F.3d 508, 512 (7th Cir. 2000)) by offering the plaintiff everything that he could obtain through a favorable judgment, proceeding with the adjudication of the case "cannot affect the result as to the thing in issue in the case before [the court]" (*San Pablo*, 149 U.S. at 314), and any dispute thus becomes "academic" (*Aetna*, 300 U.S. at 240). Likewise, a plaintiff lacks a sufficient personal stake in the action once the defendant already has offered him everything that he could obtain through adjudication of the case. Where the plaintiff already has been offered complete relief, there is no "'real need'" (*Summers*, 555 U.S. at 493 (citation omitted)) for the court to exercise its judicial power.

2. This Court's precedents have long recognized that a defendant's tender of the relief sought eliminates an Article III controversy. In *San Pablo*, for example, California sued to recover unpaid taxes against a railroad company. 149 U.S. at 308 (statement of facts

by Justice Gray). While the case was pending, "the defendant offered and tendered to the plaintiff a sum of money equal to the taxes, penalties, interest, and attorney's fee, to recover which this action was brought, and costs of suit." *Id.* at 311-12 (same). The plaintiff rejected the "offer and tender," but the defendant nevertheless deposited the offered sum in a bank account in the plaintiff's name. *Id.* at 312 (same).[3]

The Court held that "there can be no doubt that this writ of error must be dismissed, because the cause of action has ceased to exist." *Id.* at 313. The Court explained:

> The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. . . . But the court is not empowered to decide moot questions or abstract propositions or to declare, for the government of future cases, principles or rules of law which *cannot affect the result as to the thing in issue in the case before it.* No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.

Id. at 314 (emphasis added).

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[3] The money was deposited in accordance with California Civil Code section 1500, which provides that "[a]n obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank or savings and loan association within this state, of good repute, and notice thereof is given to the creditor." Cal. Civ. Code § 1500; *see San Pablo*, 149 U.S. at 313-14.

In a similar case, *San Mateo County v. Southern-Pacific Railroad Co.*, 116 U.S. 138, 142 (1885), the Court held that there was "no longer an existing cause of action" after the defendant made offers of payment that would fully satisfy its tax liabilities. The Court so held even though one of two offers of payment sent to the plaintiff's counsel contained the express condition that it was only to be "credited upon any judgment that may be obtained by the plaintiff in the action." *Id.* at 139; *see also Little v. Bowers*, 134 U.S. 547, 555 (1890) (finding no controversy between the parties where defendant had "paid in full everything that was charged against it," even though, along with the payment, the defendant had specifically made "a general protest against the legality of the charges"). And, in line with this Court's decisions, numerous lower courts have applied the rule that a defendant's tender of complete relief moots an individual claim.[4]

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[4] *See, e.g., Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1243 (10th Cir. 2011) ("[I]f an offer is made for a plaintiff's maximum recovery, his action may be rendered moot."); *Damasco v. Clearwire Corp.*, 662 F.3d 891, 897 (7th Cir. 2011) (upholding dismissal of case where defendant offered full relief); *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 574 (6th Cir. 2009) ("[A]n offer of judgment that satisfies a plaintiff's entire demand moots the case ...."); *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 502 (5th Cir. 2005) (plaintiff's "individual claims were rendered moot" when defendant offered "a settlement equal to the statutory limit on his damages"); *Weiss v. Regal Collections*, 385 F.3d 337, 342 (3d Cir. 2004) ("[U]nder traditional mootness principles, an offer for the entirety of a plaintiff's claim will generally moot the claim."); *Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir. 1994) (where defendant

These precedents not only heed Article III's limits, but give effect to what the United States has aptly called the "legitimate impulse" to refuse to "expend judicial and litigation resources resolving the merits of a claim that the defendant informs the court it will fully satisfy." U.S. Br. 13, *Genesis Healthcare*, 133 S. Ct. 1523 (2013) (No. 11-1059), 2012 WL 4960359. Article III effectuates that same impulse by barring the federal courts from attempting to adjudicate the merits of such academic claims or controversies.

3. Application of these foundational principles compels the conclusion that Plaintiff's individual claim is moot. Plaintiff's complaint sought relief for an alleged violation of the TCPA based on receipt of a text message. JA 17-18. Campbell-Ewald responded by tendering an offer that—as the district court found—"would have fully satisfied the individual claims asserted . . . by Plaintiff in this action." Pet. App. 40a. Campbell-Ewald offered to pay Plaintiff not only $1503 for "each and every unsolicited text message that was allegedly sent by or on behalf of C-E to the cell phone

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offered full damages, plaintiff "may not spurn this offer of all the damages he is owed and proceed to trial"); *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986) (no case or controversy where defendants offered the full amount in damages because "federal courts do not sit simply to bestow vindication in a vacuum"); *Abrams v. Interco, Inc.*, 719 F.2d 23, 32 (2d Cir. 1983) (affirming dismissal where defendant offered full judgment); *see also, e.g., Drs. Hill & Thomas Co. v. United States*, 392 F.2d 204 (6th Cir. 1968) (per curiam); *Lamb v. Commissioner*, 390 F.2d 157 (2d Cir. 1968) (per curiam); *A.A. Allen Revivals, Inc. v. Campbell*, 353 F.2d 89 (5th Cir. 1965) (per curiam).

owned by [Plaintiff]" (the maximum statutory damages authorized by the TCPA), but all reasonable costs Plaintiff "would recover were he to prevail in his suit." *Id.* at 38a-39a, 52a-61a. Campbell-Ewald also offered to stipulate to an injunction prohibiting it from engaging in the challenged conduct. *Id.* at 53a.[5]

Campbell-Ewald's offer eliminated any justiciable controversy between the parties because once Campbell-Ewald offered Plaintiff all the relief he could secure through a favorable judgment, the adjudication of Plaintiff's claims would no longer "affect the result as to the thing in issue in the case." *San Pablo*, 149 U.S. at 314. The best case scenario was that, after litigating the case, Plaintiff would have secured the same relief that Campbell-Ewald had offered up front. Likewise, having been offered everything he could obtain from a judgment in his favor, Plaintiff no longer possessed an adequate "personal stake" in the outcome to authorize the adjudication of his claim.

As *San Pablo* teaches, the fact that Plaintiff rejected Campbell-Ewald's offer does not mean that the requisite adversity and personal stake still existed. The question is whether the tender would afford the plaintiff complete relief. Here, as in *San Pablo*, the answer is yes. *Supra* at 19. In *San Pablo*, the defendant deposited a check in the amount of the

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[5] Although the complaint identified only a single unauthorized text message (JA 20 ¶¶ 15-16), Campbell-Ewald's tender even offered to pay Plaintiff $1503 for any additional text message that Plaintiff, in good faith, alleged he received (though discovery confirmed that there were no other text messages). *See* Pet. App. 58a.

tender in a bank account. Here, Campbell-Ewald's offer specifically provided that it would "arrange for prompt payment" of the monetary relief. Pet. App. 59a; *see, e.g.*, 28 Williston on Contracts § 72:27 (4th online ed. 2015) ("Tender is an offer to perform a condition or obligation coupled with the present ability of immediate performance, so that were it not for the refusal of cooperation by the party to whom tender is made, the condition or obligation would be immediately satisfied." (citing cases)). There was no basis to question either Campbell-Ewald's intent to fulfill the offer or the company's "present ability of immediate performance" (*id.*)—and Plaintiff never has.

Once a court has determined that the defendant's offer is for complete relief—as the district court did here—the case should end. When a court determines that a case is moot, the typical course is to order dismissal of the case. *See, e.g., United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); Pet. 14 (citing cases). But a court may also dispose of the case by entering judgment according to the terms of the offer of complete relief. *See, e.g., O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 574-75 (6th Cir. 2009); Pet. 14 n.3, 17. As this Court has observed, "[f]rom the beginning we have disposed of moot cases in the manner "'most consonant to justice" . . . in view of the nature and character of the conditions which have caused the case to become moot.'" *U.S. Bancorp Mort. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) (alterations in original) (quoting *United States v. Hamburg-Amerikanische Packetfahrt-Actien*

Gesellschaft, 239 U.S. 466, 477-78 (1916)). The entry of such a judgment itself ends any "live" controversy.[6]

C. The Ninth Circuit's Contrary Holding Defies These Well-Settled Principles

Drawing heavily from the dissent in *Genesis Healthcare* and its prior decision embracing that dissent, the Ninth Circuit held that Campbell-Ewald's "unaccepted offer alone is 'insufficient' to moot Gomez's claim" for two principal reasons. Pet. App. 5a (quoting *v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 950 (9th Cir. 2013)). Neither withstands scrutiny.

1. Like the dissent in *Genesis Healthcare*, the Ninth Circuit focused on the fact that Plaintiff did not accept Campbell-Ewald's offer, adopting the reasoning that "'[a]n unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect.'" *Diaz*, 732 F.3d at 954 (quoting *Genesis Healthcare*, 133 S. Ct. at 1533 (Kagan, J., dissenting)); *see* Pet. App. 5a. But as discussed, this Court has long recognized that a plaintiff's *acceptance* is not required to moot a claim in these circumstances. Instead, this Court looks to whether the defendant's tender would provide the plaintiff complete relief—*regardless* of whether the plaintiff has accepted the offer. *See San Pablo*, 149 U.S. at 313-14; *supra* p. 16.

The Court's refusal to adopt such an "acceptance rule" squares with the fact that courts have an independent obligation to assure that jurisdiction

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[6] Regardless of whether such a judgment is entered, Campbell-Ewald has made clear its intent "to fully satisfy [Plaintiff's] individual claims." Pet. App. 59a.

exists. *E.g.*, *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900). Article III does not give the litigants themselves the power to unilaterally confer jurisdiction on a federal court. *See, e.g.*, *Kimball v. Kimball*, 174 U.S. 158, 163 (1899) ("No consent of parties can authorize this court to exercise jurisdiction over a case in which it is powerless to grant relief."); *Town of Elgin v. Marshall*, 106 U.S. 578 (1883) (same).

As Justice Scalia has observed, "'[n]o stipulation of parties or counsel . . . can enlarge the *power*, or affect the duty, of the court'" to expound on "moot questions." *Honig v. Doe*, 484 U.S. 305, 339 (1988) (Scalia, J., dissenting) (alterations and emphasis in original) (quoting *San Pablo*, 149 U.S. at 314)). Just as a party's "consent does not confer jurisdiction," *Little*, 134 U.S. at 559, a party's *refusal* to consent to an offer of complete relief does not confer jurisdiction. In both situations, it is incumbent on the court to assess the circumstances and determine whether the requisite adversity and personal stake is present.

This Court has emphasized that "any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court." *Veazie*, 49 U.S. (8 How.) at 255; *see, e.g.*, *Poe v. Ullman*, 367 U.S. 497, 505 (1961) ("This principle was given early application and has been recurringly enforced in the Court's refusal to entertain cases which disclosed a want of a truly adversary contest, of a collision of actively asserted and differing claims."). In other

words, parties cannot contract around the jurisdictional requirements of Article III; nor does contract law impose any limitations on a court in recognizing that the requisite adversity is lacking under Article III.

There is also nothing new, or untoward, about a defendant "forcing" the resolution of a case by effectively "throw[ing] in the towel." *Chathas*, 233 F.3d at 512. Indeed, "[i]t is always open to a defendant to default and suffer judgment to be entered against him without his admitting anything—if he wants, without even appearing in the case." *Id.* And an offer of complete relief puts the plaintiff in a far better position than a default. It grants him all the relief he seeks without having to worry about spending time and resources chasing after a defendant that has defaulted in order to secure any meaningful relief at all.

As Judge Friendly put it, a defendant's offer of complete relief is "no different (except in being more favorable to the plaintiffs) than if it had submitted to a default judgment on the individual claims." *Abrams v. Interco, Inc.*, 719 F.2d 23, 32 (2d Cir. 1983). Like a defendant's decision to suffer a default judgment, a defendant's decision to put the plaintiff in a *better* position by offering the plaintiff all the relief he could obtain through a judgment in his favor eliminates any genuine controversy. At that point, "there is no justification for taking the time of the court and the defendant in the pursuit of minuscule individual claims which defendant has more than satisfied." *Id.*

2. The Ninth Circuit has also pointed to this Court's statement that "'[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Diaz*, 732 F.3d at 950 (quoting *Genesis Healthcare*, 133 S. Ct. at

1533-34 (Kagan, J., dissenting)); *see Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2012)). But that standard is no impediment here. Any relief that a court could grant would have no practical effect because it would give Plaintiff nothing more than that which Campbell-Ewald already has tendered. In *Mills v. Green*, 159 U.S. 651, 653 (1895), apparently the Court's first use of the "effectual relief" language, the Court observed that "when . . . an event occurs which renders it impossible for this court . . . to grant [the plaintiff] any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." Here, that "event" was the offer of complete relief.

In any event, the Court's use of the "effectual relief" language in other circumstances does not override the Court's application of Article III principles in analogous circumstances, such as in *San Pablo*. In addition, the "effectual relief" language is just one way to gauge mootness—it is not the only way. *See, e.g., Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 732 (2013) (declaring the case moot without reference to "effectual relief," even though the plaintiff could have theoretically received some relief—invalidation of Nike's trademark). In other words, the "effectual relief" language is not a *limitation* on mootness.

Accordingly, the Ninth Circuit erred in concluding that the courts were empowered to adjudicate Plaintiff's individual claim notwithstanding that defendant had already tendered Plaintiff all the relief he could possibly secure through this action.[7]

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[7] For the reasons discussed next, Plaintiff's asserted interest in bringing a claim on behalf of a class of unnamed

II. THE MERE EXISTENCE OF CLASS CLAIMS BEFORE ANY CLASS CERTIFICATION IS INSUFFICIENT TO CONFER ARTICLE III JURISDICTION

The Ninth Circuit also erred in concluding that it was empowered to adjudicate Plaintiff's class claim notwithstanding Campbell-Ewald's offer of complete relief. In *Genesis Healthcare*, this Court recently held that the plaintiff's representative action "became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action" at that time. 133 S. Ct. at 1529. The plaintiff's nascent hope of representing others did not "preserve her suit from mootness" in *Genesis Healthcare* (*id.* at 1530), and the same goes here.

A. As The Court Has Held, The Mooting Of A Named Plaintiff's Claim Before Certification Generally Moots Any Class Claim As Well

Rule 23 of the Federal Rules of Civil Procedure does not confer any substantive rights or enlarge the jurisdiction of the courts. *See* 28 U.S.C. § 2072(b); Fed. R. Civ. P 82. Instead, Rule 23 provides a procedural mechanism for aggregating certain similar claims. As this Court has recognized, "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). At least before any class is certified, when the underlying substantive claims have become moot—and the court

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others was also insufficient to keep his individual claim alive after he had been offered complete relief. *See* Part II, *infra*.

loses jurisdiction over the controversy of the individual plaintiff—the plaintiff's "ancillary" procedural right to bring a Rule 23 class action is extinguished as well.

Genesis Healthcare underscores the point. There, the Court considered whether an action brought under the FLSA "remained justiciable" after the plaintiff's own claims became moot "based on the collective-action allegations in her complaint." 133 S. Ct. at 1529. The Court held that, "[i]n the absence of any claimant's opting in"—that is, before any other unnamed claimants had become parties to the suit—"[plaintiff]'s suit became moot when her individual claim become moot, because she lacked any personal interest in representing others in this action." *Id.* Indeed, even though the plaintiff had a statutory right under the FLSA to bring an action on behalf of others, the Court held, "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." *Id.*

The same conclusion follows here. It is well-settled that a Rule 23 class only acquires a separate legal status when the class is certified. *See, e.g., id.* at 1530; *Sosna*, 419 U.S. at 399. "Without such certification and identification of the class, the action is not properly a class action." *Baxter v. Palmigiano*, 425 U.S. 308, 310 n.1 (1976). Thus, "only a 'properly certified' class . . . may succeed to the adversary position of a named representative whose claim becomes moot." *Kremens v. Bartley*, 431 U.S. 119, 132-33 (1977) (quoting *Board of School Commissioners v. Jacobs*, 420 U.S. 128, 130 (1975)). A plaintiff who asserts *potential* claims of an *uncertified* class under Rule 23 occupies no better position than the FLSA plaintiff who asserts a collective action before any other claimants have opted

in. Both plaintiffs "lack[] any personal interest in representing others in this action" because those others have not been identified through the certification process or been made parties to the litigation. *Genesis Healthcare*, 133 S. Ct. at 1529.

No class had been certified when Campbell-Ewald made its offer of complete relief; indeed, Plaintiff had not even moved for certification. Thus, when Plaintiff's individual claim became moot, the absent class members were not parties to the lawsuit and had no legal status. There was no plaintiff that could "succeed to the [requisite] adversary position" at that time. *Kremens*, 431 U.S. at 133; *see also O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.").

Board of School Commissioners v. Jacobs is instructive. That case involved a class action brought by six named students challenging the constitutionality of certain rules promulgated by a board of school commissioners. 420 U.S. at 128. After being informed that the named plaintiffs had graduated, the Court held that it was "clear that a case or controversy no longer exists between the named plaintiffs and the [board of school commissioners]." *Id.* at 129. The fact that the named plaintiffs had brought a class action was not sufficient to keep the case alive, because no class had been "duly certified" at the time that the plaintiffs' individual claims became moot. *Id.* Thus, the Court ordered that the complaint be dismissed. *Id.* at 130; *see also Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 430 (1976) (holding that plaintiffs' counsel's "wish

to represent a class of unnamed individuals" was insufficient to keep an action alive, where the named plaintiffs' claims had become moot and "there has been no certification of any such class") (Rehnquist, J.).

In short, "the mere presence of [class]-action allegations in [Plaintiff's] complaint cannot save the suit from mootness once [his] individual claim is satisfied." *Genesis Healthcare*, 133 S. Ct. at 1529. As Judge Friendly observed in a similar vein, "we know of no principle that a plaintiff must be allowed to pursue litigation in which he no longer has an interest merely because this could benefit others." *Abrams*, 719 F.2d at 33 n.9. Just like the plaintiff in *Genesis Healthcare*, Plaintiff here had "no personal interest in representing putative, unnamed [class members], nor any other continuing interest that would preserve h[is] suit from mootness," after his individual claim became moot and before any class had been certified. 133 S. Ct. at 1532.

B. As In *Genesis Healthcare*, None Of The Limited Exceptions That This Court Has Recognized Can Save This Case

This Court has recognized only limited exceptions to the rule that a class claim cannot save a case from mootness when the named plaintiff's claim becomes moot before any class is certified. As in *Genesis Healthcare*, none of those exceptions applies here.

1. This Court has held that "where a named plaintiff's claim is 'inherently transitory,' and becomes moot prior to certification, a motion for certification may 'relate back' to the filing of the complaint." *Genesis Healthcare*, 133 S. Ct. at 1528 n.2 (citing *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991)). The Ninth Circuit invoked this exception in holding that Plaintiff's class claim was not moot. *See*

Pet. App. 5a (citing *Pitts*, 653 F.3d at 1091-92). But as *Genesis Healthcare* makes clear, that was error.

As the Court explained in *Genesis Healthcare*, "[t]he 'inherently transitory' rationale was developed to address circumstances in which the challenged conduct was effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course." 133 S. Ct. at 1531. The Court explained that "this doctrine has invariably focused on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy," such as where a plaintiff seeks "to bring a class action challenging the constitutionality of temporary pretrial detentions." *Id.* Because "pretrial custody likely would end prior to the resolution of his claim," the relation-back doctrine is necessary to prevent the defendant's conduct from being "insulate[d] . . . from review." *Id.*

In *Genesis Healthcare*, the Court recognized that the plaintiff's claim for alleged violations of the FLSA based on the defendant's pay practice for meal breaks was not "inherently transitory" under this rationale. The Court explained that, unlike a challenge to "temporary pretrial detentions," the plaintiff's FLSA claim "cannot evade review" and would "remain[] live until it is settled, judicially resolved, or barred by a statute of limitations." *Id.* The same is true for Plaintiff's TCPA claim here, which has no "fleeting nature" about it. *Id.* In *Genesis Healthcare*, the Court also noted that the termination of the plaintiff's FLSA collective action (due to the offer of complete relief) did not prevent other putative plaintiffs from seeking "to vindicate their rights in their own suits." *Id.* Once again, the same goes here. Holding that this class

action is moot would leave other putative plaintiffs "free" to pursue their own TCPA claims. *Id.*

The Ninth Circuit has reasoned that "inherently transitory claims" include class claims "'"acutely susceptible to mootness" in light of [the defendant's] tactic of "*picking off*" lead plaintiffs with a Rule 68 offer to avoid a class action.'" *Pitts*, 653 F.3d at 1091 (alteration in original) (emphasis added) (citation omitted). But *Genesis Healthcare* rejected the argument that the risk that "defendants can strategically use Rule 68 offers to 'pick off' named plaintiffs before the collective-action process is complete, render[s] collective actions 'inherently transitory' in effect." 133 S. Ct. at 1531. As the Court explained, the Court's relation-back doctrine "has invariably focused on the *fleeting nature* of the challenged conduct giving rise to the claim, not on the defendants' litigation strategy." *Id.* (emphasis added). Accordingly, the Ninth Circuit's policy concerns about defendants purportedly "picking off" plaintiffs provides no basis for saving Plaintiff's class claim.

The Ninth Circuit's application of the relation-back doctrine cannot be reconciled with *Genesis Healthcare*. The Ninth Circuit admitted that "*Genesis* undermined some of the reasoning employed in [its prior decisions in] *Pitts* and *Diaz*." Pet. App. 6a. (That was an understatement.) But the court found that "*Genesis* is not 'clearly irreconcilable' with" either case because of the differences between collective actions under the FLSA and Rule 23 class actions. *Id.* at 6a-7a. The Ninth Circuit did not identify which differences make the difference. But any conceivable distinction between FLSA collective actions and Rule 23 class actions emerges after, not before, certification. Before

a class is certified, the interests of the named plaintiff and the absent class members or claimants are identical. Neither the putative FLSA claimants nor absent Rule 23 class members have any legal status and a putative class or collective action representative has no personal stake in representing those unnamed and unidentified class members or claimants.

What *is* different between a collective action under the FLSA and a class action under Rule 23 is that Congress created a statutory right to the former, whereas Rule 23 simply provides a "procedural device" (*Roper*, 445 U.S. at 331) for aggregating claims—that does not create any substantive rights. 28 U.S.C. § 2072(b). If anything, that distinction makes this an easier case than *Genesis Healthcare* when it comes to recognizing that Plaintiff's class claim became moot at the same time his individual claim became moot.

2. The Court has also held "that where a certification motion is denied and a named plaintiff's claim subsequently becomes moot, an appellate reversal of the certification decision may relate back to the time of the denial." *Genesis Healthcare*, 133 S. Ct. at 1528 n.2 (citing *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980)). This holding also flows from the principle that unnamed class members have no separate "legal status" until a class is actually certified. *Id.* at 1530 (discussing *Sosna*, 419 U.S. at 399-402); *see Geraghty*, 445 U.S. at 415 n.8 (Powell, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ., dissenting) (explaining that "[c]ertification is no mere formality"). The Court's holding in *Geraghty*, however, was "limited to the appeal of the denial of the class certification motion." 445 U.S. at 404.

That "relation back" principle is inapplicable here, for the same reasons that it was inapplicable in *Genesis Healthcare*. In *Genesis Healthcare*, the Court held that *Geraghty* did not apply because the plaintiff's claim became moot before "the district court denie[d] class certification." 133 S. Ct. at 1530. Accordingly, there was "simply no certification decision to which [plaintiff]'s claim could have related back." *Id.* So too here. Plaintiff's claim became moot before any class was certified (or class certification was denied), thus "foreclosing any recourse to *Geraghty*." *Id.*

In *Roper*, the Court likewise allowed the appeal of the denial of class certification where "the named plaintiffs' individual claims became moot after the District Court denied their motion for class certification under Rule 23." *Genesis Healthcare*, 133 S. Ct. at 1531. This Court has made clear that *Roper* is limited to its facts and "the unique significance of certification decisions in class-action proceedings," and, indeed, has cast doubt on its "continuing vitality" on its own terms. *Id.* at 1532 & n.5. Because this case does not involve an appeal from any certification decision, *Roper*—no matter its "continuing validity" in the circumstances it addressed—is inapplicable.

C. Respecting Existing Mootness Principles Furthers The Purposes Of Rule 23

Policy concerns about class action practice cannot expand the scope of Article III. But in any event, the Ninth Circuit overlooked the interests in encouraging defendants to grant complete and prompt relief to named plaintiffs, and, if anything, it is the dismissal of this case that would better serve the interests of Rule 23 and any other potential claimants.

One of the central requirements of a class action under Rule 23 is an adequate representative who is a member of the class. A putative class representative must show that he will "fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4), and that "the claims ... of the representative parties are typical of the claims of the class," Fed. R. Civ. P 23(a)(3). Rule 23's threshold conditions derive from the Article III requirement that putative class representatives "possess the same interest and suffer the same injury" as members of the putative class. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974); *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26; *General Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982).

A named plaintiff who already has secured complete relief on his claims, and therefore lacks a personal stake in the outcome, occupies a fundamentally different position than putative class members. Although Plaintiff himself could do no better than Campbell-Ewald's offer of complete relief, the absent members of the putative class likely could do no worse than to be yoked to the binding class certification sought by him. As noted, the typical TCPA settlement offers absent class members a small fraction of the statutory damages they might recover, deprives them of individual remedies, and saddles them with unnecessary attorney's fees. *Supra* at 4. One might charitably view this as a method of "spreading litigation costs"; if so, it is one that comes at considerable expense to the absent class members.

Such litigation hardly advances the objectives of Rule 23, much less the interests of justice. Nor would it advance the interests of the TCPA, which, as

discussed, was enacted with an entirely different litigation model in mind than class actions driving mass settlements that result in lucrative attorney's fees for class action lawyers and pennies on the dollar for the recipients of unwanted texts or calls. *Supra* at 4. Neither Plaintiff nor his attorneys have a right to crusade for such an award or settlement here.[8]

III. CAMPBELL-EWALD IS ENTITLED TO DERIVATIVE SOVEREIGN IMMUNITY ON PLAINTIFF'S TCPA CLAIM

If this action is nevertheless justiciable, then Campbell-Ewald is entitled to derivative sovereign immunity, as the district court held. Pet. App. 28a-34a. This Court has long recognized that "government contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertaking with the United States." *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583 (1943) (citing *Yearsley*). That understanding squares with this Court's recognition that those who are retained by the government to work on its behalf are entitled to traditional immunity from suit—regardless of "the nature of their particular relationship with the

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[8] *See, e.g., Wilkins v. HSBC Bank Nevada, N.A.*, No. 14 C 190, 2015 WL 890566, at *3, *11 (N.D. Ill. Feb. 27, 2015) (approving a settlement that allocated $2.95 per class member, while awarding class counsel $9.5 million in fees); *Amadeck v. Capital One Fin. Corp. (In re Capital One Tel. Consumer Prot. Act Litig.)*, MDL Nos. 2416 et al., 2015 WL 605203, at *5, *19 (N.D. Ill. Feb. 12, 2015) (approving a settlement that allocated $2.72 per class member, while awarding class counsel $15.6 million in fees).

government. *Filarsky v. Delia*, 132 S. Ct. 1657, 1665-66 (2012). The Ninth Circuit erred in reversing the district court's decision recognizing that Campbell-Ewald is entitled to derivative sovereign immunity.

A. As This Court Has Recognized, Those Whom The United States Authorizes To Act On Its Behalf Are Generally Immune From Suit

1. The United States enjoys default immunity from suit. *See United States v. Sherwood*, 312 U.S. 584, 586 (1941). The United States is not subject to damages actions unless Congress waives the United States' immunity through "'unequivocally expressed'" statutory language. *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 472 (2003) (citation omitted). "In the absence of clear congressional consent," courts lack jurisdiction "'to entertain suits against the United States.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *Sherwood*, 312 U.S. at 587).

Because the government cannot function without the assistance of those who do its work, this Court has long recognized that immunity from suit extends "not only to public employees but also to others acting on behalf of the government." *Filarsky*, 132 S. Ct. at 1665. As the Court has explained, "the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities." *Id.* at 1663. Rather, "those who carr[y] out the work of government enjoy[] various protections from liability when doing so," regardless of whether they are full-time employees or private parties temporarily engaged "by the government to assist in carrying out its work." *Id.* at 1660, 1667.

Such immunity extends to suits under both state and federal law. *See, e.g., Howard v. Lyons*, 360 U.S. 593, 594-98 (1959) (holding that Naval officer was immune from defamation suit under Massachusetts law); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."); *Butz v. Economou*, 438 U.S. 478, 504 (1978) (concluding that it is "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials"); *see also Tapley v. Collins*, 211 F.3d 1210, 1214-15 & n.9 (11th Cir. 2000) (collecting numerous court of appeals cases finding qualified immunity available as a defense to claims arising under various federal statutes).

This Court likewise has explained that private contractors doing the work of the government are protected from suit whether they are individuals or corporations. *See Filarsky*, 132 S. Ct. at 1667 (private attorney retained by the City); *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. at 19 (construction company acting "pursuant to a contract with the United States Government"). In both situations, this Court has recognized that government contractors are entitled to immunity for actions taken on the government's behalf and under its supervision, pursuant to a constitutionally valid authorization, within the scope of their contractual relationship with the government.

In *Yearsley*, the United States contracted with a construction company to build two dikes on the

Missouri River, which the company did under the direction and supervision of the Army. 309 U.S. at 19-20. A property owner, Yearsley, brought suit against the company in state court, seeking damages under a takings theory for the loss of land allegedly caused by erosion as a result of the dikes. *Id.* at 20. This Court held that the company could not be found liable for the work it performed pursuant to the contract under the supervision of the government. *Id.* at 20-21. So long as the government constitutionally authorizes a private contractor to act on its behalf, the Court explained, "there is no liability on the part of the contractor for executing its will." *Id.*; *see also Brady*, 317 U.S. at 583 (recognizing *Yearsley*'s derivative immunity rule); *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (Wilkinson, J.) (explaining that it is "well-settled law that contractors and common law agents acting within the scope of their employment for the United States have derivative sovereign immunity").

In *Boyle v. United Technologies Corp.*, this Court recognized that certain state law claims against federal government contractors are outright preempted because of the significant conflict between imposing liability on federal officials or contractors operating in the course of their duties and the important federal "interest in getting the Government's work done." 487 U.S. 500, 505 (1988). Although this case does not involve preemption of state law claims, *Boyle* underscores the important federal interest in protecting those who do the government's work from civil liability—especially those who work with the United States military to further its mission.

2. The immunity principles recognized in *Yearsley*, *Filarsky*, and *Boyle* are designed to protect

interrelated and essential public interests. *See Metzgar v. KBR, Inc. (In re KBR, Inc.)*, 744 F.3d 326, 344 (4th Cir. 2014) ("*Yearsley* furthers the same policy goals that the Supreme Court emphasized in *Filarsky*."), *cert. denied*, 135 S. Ct. 1153 (2015).

First, immunity facilitates the government's ability to draw on the expertise of those outside its workforce. Because it would be inefficient and infeasible for the government to hire full-time employees with the "specialized knowledge or expertise" to execute every government objective, the government frequently "must look outside its permanent work force" to achieve its ends. *Filarsky*, 132 S. Ct. at 1665-66. In addition, "the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts." *Id.* at 1666. Similarly, shielding contractors from liability ensures that they may "serve the government ... with the decisiveness and the judgment required by the public good'"—*i.e.*, that they may concentrate on performing the government's will without "the harmful distractions from carrying out the work of government that can often accompany damages suits." *Id.* at 1665 (citation omitted).

Second, immunity ameliorates the risk that contractors might decline to carry out the work of a principal—the government—that is itself immune from suit. Unlike other circumstances, in which a contractor shares any risk of liability with its principal, the government and its "employees will often be protected from suit by some form of immunity," leaving "those working alongside them ... holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the

same activity." *Id.* at 1666. Thus, unless private contractors are themselves shielded from liability, those "with a choice might think twice before accepting a government assignment," *id.*, frustrating the government's important interest in engaging outside expert contractors to accomplish its myriad objectives.

Third, granting immunity to others vindicates the United States' own immunity. If government contractors were not entitled to immunity, "[t]he financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since ... contractors will predictably raise their prices to cover, or to insure against, contingent liability," as well as the cost of associated litigation. *Boyle*, 487 U.S. at 511-12. That would force the United States to bear indirectly the very costs it retained its sovereign immunity to avoid. As the *Boyle* Court recognized, "[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to [work for] the Government, or it will raise its price." *Id.* at 507. For that reason, it correctly observed that "[i]t makes little sense to insulate the Government against financial liability ... when the Government [acts] itself, but not when it contracts [for the act in question]." *Id.* at 512.

Consistent with the exceedingly important federal interests implicated by the imposition of civil liability upon those working on the government's behalf, the government itself has consistently recognized the derivative sovereign immunity doctrine. In *Yearsley*, for example, the government not only acknowledged and advocated the "general rule" that "an agent of the Government cannot be held accountable for actions

lawfully authorized or ratified by the Government," but argued that this rule was "obvious as a matter of principle." U.S. Brief 19-21, *Yearsley v. W.A. Constr. Co.*, 309 U.S. 18 (1940) (No. 156), 2939 WL 48388 (*Yearsley* U.S. Br.). This past year, the government again recognized the derivative sovereign immunity doctrine and the fact that "derivative sovereign immunity ... 'protects agents of the sovereign from liability for carrying out the sovereign's will.'" U.S. Brief 4, *KBR v. Metzgar*, No. 13-1241 (Dec. 16, 2014), 2014 WL 7185601 (*KBR* U.S. Br.) (citation omitted).

B. The Ninth Circuit Erroneously Held That Derivative Sovereign Immunity Is Limited To "Public Works Projects"

The Ninth Circuit held that the doctrine of derivative sovereign immunity was categorically unavailable in this case on the ground that *Yearsley*'s holding is limited to the "public works" context in which that case arose. Pet. App. 15a. That is incorrect.

Yearsley reaffirmed the general rule that so long as the government acts constitutionally in authorizing a government actor to take action—whether within or outside of the public works context—"there is no liability on the part of the contractor for executing its will." 309 U.S. at 20-21. That longstanding principle follows naturally from the immunity principles this Court has recognized in other situations. *See supra*, Part A. It is not limited to "public works projects."

According to the Ninth Circuit, *Yearsley* merely articulated "a narrow rule regarding claims arising out of property damage caused by public works projects." Pet. App. 15a. It is true that the underlying contract in *Yearsley* involved a "public works project"—the construction of dikes on the Mississippi River to

prevent erosion. But nothing in *Yearsley* purported to limit its immunity holding to the particular type of contract at issue in that case, and there is no justification for drawing such an artificial limit.

As this Court has observed, "examples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself." *Filarsky*, 132 S. Ct. at 1665. This Court has never suggested that such immunity is, or should be, limited to actions taken by those working for the government on public works projects—however that category is formally defined. And in contrast to the Ninth Circuit, numerous other circuit courts have recognized the availability of derivative sovereign immunity outside the public works context. *See* Pet. 26 (collecting cases invoking *Yearsley* in wide range of contexts).

This Court has declined to carve up immunity on a contract-by-contract basis. In *Boyle*, for example, the Court recognized that "[t]he federal interest justifying [*Yearsley*'s] holding surely exists as much in procurement contracts as in performance contracts." 487 U.S. at 506. The Court found "no basis for a distinction" between the federal interests served by shielding government contractors from liability in *Yearsley* and *Boyle*, even though the latter involved the procurement of military equipment entirely unrelated to "public works." And the strong policy reasons favoring immunity are not limited to those who engage in public works projects. Limiting the availability of immunity to the narrow facts of *Yearsley* would therefore seriously undermine the government's interest in being able to efficiently and cost-effectively

engage private contractors to assist it in doing the varied and important work of the federal government.

The Ninth Circuit also erred in suggesting that *Yearsley* is limited to situations that "implicate a constitutional 'promise to compensate' injured plaintiffs such that an alternate remedy exists." Pet. App. 15a. The Court did not adopt a compensation requirement as a limitation on the availability of immunity. Nor would such a compensation requirement make sense. Among other things, if an alternative remedy were always required, then the costs of that remedy would invariably be passed on to the government, defeating an important policy underlying common law immunity. *Supra* at 38-40. Not surprisingly, therefore, this Court has relied on *Yearsley*'s reasoning even in cases where the plaintiff lacked an alternative form of relief. *See, e.g., Boyle*, 487 U.S. at 505-06, 511-12.

The Ninth Circuit erred in holding that contractors working on the government's behalf are entitled to immunity only with respect to "property damage caused by public works products." Pet. App. 15a. Its decision must be set aside for that reason alone.

C. The District Court Properly Concluded That Campbell-Ewald Is Entitled To Derivative Sovereign Immunity

The district court properly held that Campbell-Ewald is entitled to immunity from Plaintiff's suit.

1. This Court presumes that "common-law principles of . . . immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so." *Pulliam v. Allen*, 466 U.S. 522, 529 (1984); *see Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (Congress is

presumed to be aware of existing law, including judicial decisions). Congress legislated against those background principles, including *Yearsley*, when it enacted the TCPA. There is no evidence—much less a "clear legislative intent"— that Congress intended the TCPA to abrogate the immunity typically available for those working on behalf of the government. Finding that Campbell-Ewald is immune from suit in the circumstances here is therefore consistent with the TCPA. *See Filarsky*, 132 S. Ct. at 1665 (reading § 1983 in light of common law immunity principles).

2. The TCPA expressly applies to phone calls or texts made by "*any person* within the United States." 47 U.S.C. § 227(b)(1) (emphasis added). Federal employees, including the officers of the Navy Recruiting Command, are equally "person[s]" within the meaning of 47 U.S.C. § 153(39). Had Naval officers devised the recruiting campaign at issue in this case or sent the challenged text message, the government almost certainly would argue, correctly, that they are entitled to immunity from suit and that Plaintiff could not recover for any mistaken inclusion of a particular phone number on an opt-in list of thousands, whether the Naval officers devised the list themselves or relied on another unit, with expertise in such matters, to compile the list. *See, e.g., Butz*, 438 U.S. at 507 ("Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law."); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) ("The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, mistake of fact, or a mistake based on mixed questions of law and fact.'" (citation omitted)).

3. The result is no different simply because the Navy sought to take advantage of the added communications expertise of Campbell-Ewald and contracted with that company to act on the Navy's behalf and under its direct supervision.

As its contract specifies, the Navy hired Campbell-Ewald to work "in coordination with the Navy" to develop a "Strategic Communications Plan (Strategic Plan) for Navy approval," as well as an annual plan "for approval by senior level Navy management that achieves the strategic goals for that year [and] meets Navy's recruiting goals and any special goals or needs the Navy may specify." JA 87. The Navy directed Campbell-Ewald to develop a recruiting campaign utilizing 21st century media. Campbell-Ewald proposed a text-message campaign, as well as engaging a third-party, MindMatics, to execute the campaign by sending messages to recipients sharing certain demographic characteristics who had opted in to receive such communications. *Id.* at 59-60, 179, 182, 180-81, 228-34; *see* C.A.E.R. 393-94. The Navy expressly approved the mobile marketing campaign, the text message itself, and the engagement of MindMatics and use of its opt-in list. JA 232-34, 51-52.

Plaintiff has not contested that the Navy validly authorized Campbell-Ewald to develop a recruiting campaign using 21st century media, to prepare a particular message, and to engage a subcontractor to execute the campaign. In fact, Plaintiff conceded that Campbell-Ewald was acting "on behalf of the U.S. Navy." *Id.* at 19-20. And the record makes clear that the Navy closely supervised Campbell-Ewald and approved all aspects of the recruiting campaign. *Id.* at 51-52, 60-61, 232-34. As the Navy's own Rule 30(b)(6)

witness testified, "Campbell-Ewald doesn't do anything without the approval of the United States Navy Recruiting Command or somebody in it." *Id.* at 47; *see id.* at 91 (contract specifying that "Navy Recruiting Command (CNRC) holds the ultimate right of approval for all deliverables under this contractor"); *id.* at 47 ("We [Navy Recruiting Command] were in constant contact with Campbell-Ewald on a daily basis."). Nor has Plaintiff ever alleged that Campbell-Ewald had unique knowledge of any risk involved in engaging MindMatics or using its opt-in list that Campbell-Ewald withheld from the government.

Particularly given the Navy's close supervision and approval of Campbell-Ewald's actions in executing the contract, the case for immunity here is at least as strong as, if not stronger than, in *Yearsley*.

4. Plaintiff's real complaint is with the actions of MindMatics, not Campbell-Ewald. As discussed, MindMatics was responsible for the opt-in list, and MindMatics sent the text message. But Plaintiff did not name MindMatics as a defendant. And any alleged mistake by MindMatics cannot deprive Campbell-Ewald of derivative sovereign immunity.

First, whatever the reach of the TCPA, a vicarious liability theory cannot deprive Campbell-Ewald of derivative sovereign immunity. It is well-settled that vicarious liability does not abrogate the immunity of those acting on behalf of the government. *See, e.g.*, *Robertson v. Sichel*, 127 U.S. 507, 515-16 (1888) ("A public officer *or agent* is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the *sub-agents* or servants or other persons properly employed by or under him, in the discharge of his

official duties." (emphases added)); *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) ("[V]icarious liability is inapplicable to *Bivens* and § 1983 suits . . . . .").[9]

Second, even if Campbell-Ewald had sent the text message at issue itself and violated a provision of its contract with the Navy (instead of subcontracting for MindMatics to carry out this task, in accordance with the contract and with the Navy's approval), that would not abrogate Campbell-Ewald's immunity either. As the United States recently recognized in an analogous context, a contractor generally should not be subject to liability "even if an employee of a contractor allegedly violated the terms of the contract, as long as the alleged conduct at issue was within the general scope of the contractual relationship between the contractor and the federal government." *KBR* U.S. Br. 16; *see also id.* at 18-19. Here, there is no question that Campbell-Ewald acted within the "general scope" of its contract. And even assuming that individuals were mistakenly included in the opt-in list, such a mistake is protected by immunity. *E.g.*, *Pearson*, 555 U.S. at 231.

Third, it would make little sense to reserve immunity only for those who do not commit any errors while acting on the government's behalf. Such a rule would defeat the very function of immunity—to shield a party from liability *for alleged wrongdoing*. It also

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[9] The FCC has interpreted the TCPA to impose vicarious liability even though Congress did not specify such liability. *In re DISH Network, LLC*, 28 FCC Rcd. 6574, 6574-75 (2013). But the salient point here is that there is no evidence, much less any clear statement, that Congress intended to override the common law rule that vicarious liability cannot abrogate immunity that otherwise exists.

would contravene the longstanding principle that even those working on the government's behalf who violate the laws or even the *Constitution* of the United States—something all government officers swear to uphold—may be entitled to the protection of immunity. *See, e.g. Filarsky*, 132 S. Ct. at 1661, 1667-68 (holding that contractor was entitled to qualified immunity from suit alleging Fourth Amendment violation). And such a limitation would defeat the important interests served by the immunity doctrine by rendering immunity virtually meaningless in this context.

5. Finally, affording Campbell-Ewald immunity advances the same vital public interests that justify shielding from liability others working on the government's behalf. The Navy engaged Campbell-Ewald because of its specialized expertise in communications, including emerging communications technologies. Outsourcing such work is increasingly common and beneficial for the government. *See* Stan Soloway & Alan Chvotkin, *Federal Contracting in Context, in Government By Contract* 192, 210 (Jody Freeman & Martha Minow eds., 2009) (noting that government agencies, "locked in a competition for talent with the global economy at large," have difficulty retaining technologically creative workers and "increasingly have little choice but to ... turn[] to private sector partners" for such matters). Subjecting contractors like Campbell-Ewald to liability that the government itself would not incur for carrying out the government's work would discourage outside experts from undertaking such projects for the government.

Depriving contractors like Campbell-Ewald of derivative immunity also ultimately would cause contractors to pass through to the government the risk

of liability and litigation through higher prices. *See Boyle*, 487 U.S. at 511-12 (observing that "[t]he financial burden of judgments against contractors would ultimately be passed through, substantially if not totally, to the United States itself"). Even still, the risk that contractors like Campbell-Ewald could be left "holding the bag," in whole or part, for carrying out the government's work will undermine the effectiveness of the services that the government receives and make outside experts "think twice before accepting a government assignment," *Filarsky*, 132 S. Ct. at 1666, including military recruiting campaigns that seek to harness modern communications technology.

The government routinely relies on—and benefits from—the specialized knowledge and experience of contractors to pursue and achieve its important public objectives. Affording immunity to those like Campbell-Ewald for actions taken on the government's behalf, under its close, daily supervision and with its explicit approval, to achieve core government objectives—like recruiting for the Nation's Armed Forces—not only is compelled by this Court's precedents, but is crucial both to advancing the important public "interest in getting the Government's work done," *Boyle*, 487 U.S. at 505, and vindicating Congress' decision to retain the government's own sovereign immunity from suit.

That does not mean, of course, that contractors are free to violate government contracts at will. Far from it. The United States has ample tools at its disposal to penalize contractors who do not comply with contract terms. As the government recently observed in a related context, "[d]etermination of the appropriate recourse for [a] contractor's failure to adhere to contract terms and related directives under its

exclusively federal relationship with the United States" should be "the responsibility of the United States, through contractual, criminal, or other remedies—not private . . . suits." *KBR* U.S. Br. 16.

* * * * *

One of the fundamental purposes of Article III is that it prevents courts from "expounding the law" when "a proper case or controversy" is not before them. *DaimlerChrysler*, 547 U.S. at 341. In this case, that limitation should have prevented the Ninth Circuit from expounding on derivative sovereign immunity at all. But if this Court concludes that the Ninth Circuit had jurisdiction to address the immunity issue, it should reverse the Ninth Circuit's ruling that Campbell-Ewald was not entitled to immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

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No. 14-857

In the Supreme Court of the United States

CAMPBELL-EWALD COMPANY, PETITIONER

v.

JOSE GOMEZ, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does an offer of "complete relief" eliminate an Article III case or controversy and render the case moot?

2. If the answer to the first question is "yes," can a class-action defendant moot the entire case by offering "complete relief" only to the representative plaintiff and only on the representative plaintiff's individual claims?

3. Jose Gomez alleges that Campbell-Ewald violated the Telephone Consumer Protection Act (TCPA) by sending him a text message that he had not consented to receive. Campbell-Ewald claims that the text message was sent on behalf of the Navy, and that because the Navy is immune from suit Campbell-Ewald should enjoy that same immunity for acts performed on the Navy's behalf. The question presented is:

Can Campbell-Ewald assert "derivative sovereign immunity" for its alleged violations of the TCPA when its contract with the Navy required it to "comply with all applicable Federal . . . laws," and when the Navy had expressly directed Campbell-Ewald to send text messages *only* to those who had "opted in" to receive them?

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI
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BRIEF FOR THE RESPONDENT

A civil defendant does not "moot" an Article III case or controversy by offering to settle on the plaintiff's terms. This is no different from a criminal defendant's offer to plead guilty and accept the maximum sentence. In each situation, the defendant's capitulation might justify entry of judgment for the plaintiff or prosecutor. But it does not eliminate an Article III case or controversy or deprive the court of subject-matter jurisdiction. A mere *offer* of complete relief—which is not legally binding on anyone—does not disable the courts from redressing the plaintiff's injuries. And if a mere offer of complete relief could render a case moot, then district courts would be powerless to enter judgment in response to a defendant's unilateral surrender. Not even Campbell-Ewald is will-

ing to accept that unavoidable implication of its mootness argument. Pet. Br. 10, 21.

Campbell-Ewald's argument for "derivative sovereign immunity" is equally groundless. The government's sovereign immunity does not carry over to employees, agents, or contractors who violate federal law. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Ex parte Young*, 209 U.S. 123, 159–60 (1908); 28 U.S.C. § 2679(b)(2)(B) (no Westfall Act immunity for government employees who violate federal statutes). And the idea that the executive can "authorize" its contractors to violate federal statutes is untenable and unconstitutional. *See* U.S. Const. art. II, § 3 (President "shall take Care that the Laws be faithfully executed"); *id.* art. VI, cl. 2 (federal statutes enacted "in Pursuance" of the Constitution "shall be the supreme Law of the Land"). Government contractors cannot assert a Nuremberg defense if their contract instructed them to violate an act of Congress.

Even if this Court wanted to create a new immunity for government contractors, that would not help Campbell-Ewald because the Navy never authorized it to violate the TCPA. Campbell-Ewald's contract with the Navy required compliance "with all applicable Federal ... laws." J.A. 220. And the Navy specifically directed Campbell-Ewald to send text messages only to those who had "opted in" to receive them. J.A. 42–45. No contractor can plausibly claim "derivative" sovereign immunity for acts that violate not only the sovereign's laws but also the sovereign's explicit instructions. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940)

("[T]here is no liability on the part of the contractor for executing [Congress's] will.").

STATUTORY PROVISIONS INVOLVED

The Telephone Consumer Protection Act (TCPA) provides, in relevant part:

> It shall be unlawful for any person within the United States . .—
>
> (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—
>
> . . .
>
> (iii) to any telephone number assigned to a . . . cellular telephone service . . .

47 U.S.C. § 227(b)(1).

The FCC interprets "call" to include text messaging. *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14115 (2003); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009). The FCC also interprets the TCPA to incorporate vicarious liability. *See In re DISH Network, LLC*, 28 FCC Rcd. 6574, 6574 (2013); Pet. App. 10a–13a.

Other relevant statutes and constitutional provisions are at Pet. App. 64a–68a.

STATEMENT

Before summarizing the undisputed facts, we must note that Campbell-Ewald's rendition of the facts is incomplete in several respects.

First, Campbell-Ewald's contract with the Navy required compliance "with all applicable Federal, State and local laws." J.A. 220; *see also id.* at 81 (incorporating this requirement from Federal Acquisition Regulation (FAR) § 52.212-4(q)). This contractual provision is unmentioned in Campbell-Ewald's brief. But it refutes any suggestion that the Navy "approved" or "authorized" anyone to send text messages in violation of the TCPA.

Second, Campbell-Ewald incorrectly states that "the Navy sent" the text messages. Pet. Br. 2. The text messages were sent by MindMatics, not the Navy. J.A. 41–42, 73–77, 183–89; Pet. Br. 46 ("MindMatics sent the text message."). If Campbell-Ewald thinks that MindMatics's actions should be attributed to the Navy under principles of agency, then it should make that clear before telling this Court that "the Navy sent" the text messages.

Third, Campbell-Ewald insists that it offered Mr. Gomez "complete relief on his TCPA claim." Pet. Br. 2. But it neglects to mention that Mr. Gomez had demanded "reasonable attorneys' fees," which neither of Campbell-Ewald's offers provided. *Compare* J.A. 23 *with* Pet. App. 52a–61a. Calling this "an offer of complete relief" begs an important question by assuming that an offer without attorneys' fees qualifies as "complete relief"—even when the plaintiff has demanded them, and even when class certification would allow the representative plaintiff to share the lawyer's bill that otherwise would be borne

entirely by him. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 n.9 (1980).

A. Facts

The following facts are undisputed. Because Campbell-Ewald is seeking summary judgment on its "derivative sovereign immunity" claim, any facts relevant to immunity must be viewed in the light most favorable to Mr. Gomez. *See Plumhoff v. Rickard*, 134 S. Ct. 2012, 2017 (2014).

In 2005, the Navy entered into a contract with Campbell-Ewald. J.A. 78–175. The contract required Campbell-Ewald to provide advertising services in exchange for a fixed monthly payment. J.A. 82. This fixed-price arrangement established annual recruiting goals but gave Campbell-Ewald substantial discretion in proposing media strategies and advertisements for the Navy's approval. J.A. 29, 30–31, 91. The contract did not require Campbell-Ewald or anyone else to send text messages. And it required Campbell-Ewald to comply with all federal laws, including the TCPA. J.A. 81, 220.

Under the contract, Campbell-Ewald would develop an annual "Advertising and Marketing Plan" for the Navy's review and approval. J.A. 87. In December 2005, Campbell-Ewald submitted its plan for fiscal year 2006, which briefly mentioned the possibility of using text messaging. C.A.E.R. 378–79 ("Look for emerging tools that prove the high-tech claims and make Navy seem contemporary. Potential media to test include: – Podcasting – Gaming – Mobile, SMS, etc. – Blogs – RSS feeds"). In January 2006, the Navy approved the annual plan but did not provide further instruction to Campbell-Ewald.

J.A. 34.[1] Campbell-Ewald then chose MindMatics, LLC, as the subcontractor that would implement the proposed text-messaging campaign. C.A.E.R. 159–66.

Campbell-Ewald submitted a more detailed proposal to the Navy on March 17, 2006. J.A. 176–82 ("Navy 2006 Wireless/Mobile Tactical Media Recommendations"). This document provided that "MindMatics will deliver a Navy branded SMS (text) direct mobile marketing 'push' program to the cell phones of 150,000 Adults 18–24 from an opt-in list of over 3 million." J.A. 182. The Navy approved this plan based on Campbell-Ewald's representation that the text messages would be sent only to 18-to-24 year olds—and only to those who had "opted in" to receive them, as required by the TCPA. J.A. 41–44.

In April 2006, Campbell-Ewald and MindMatics signed a contract. J.A. 183–89. The contract required MindMatics to assemble an opt-in list of 150,000 adults ages 18–24 and send them the Navy-approved text message. J.A. 185–87. On April 28, 2006, the Navy approved the text message that Campbell-Ewald had drafted, after changing one word. J.A. 41, 72. Then, at Campbell-

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[1] Campbell-Ewald's brief implies that it was the Navy and not Campbell-Ewald that initiated the idea of a mobile-marketing campaign. Pet. Br. 5 ("In 2006, as part of an ongoing contract with the Navy, the Navy directed Campbell-Ewald to develop a mobile marketing campaign using emerging forms of technology"). Omitting that Campbell-Ewald proposed the mobile-marketing campaign may improve the appearance of Campbell-Ewald's "derivative sovereign immunity" argument. But it does not assist the Court in its duty to construe the facts in the manner most favorable to Mr. Gomez. *See Plumhoff*, 134 S. Ct. at 2017.

Ewald's direction, MindMatics sent the following text message to approximately 100,000 individuals:

> Destined for something big? Do it in the Navy. Get a career. An education. And a chance to serve a greater cause. For a FREE Navy video call [phone number]

J.A. 20.

The text-messaging campaign was bungled in numerous ways. First, only 102,513 messages were sent, even though the Navy-approved plan called for 150,000 recipients. *See* Decl. of William M. Kushner, ECF No. 59-6. Second, respondent Jose Gomez received the message even though he had never consented to receive it and was nearly 40 years old at the time—far above the Navy-approved age range of 18–24. J.A. 20, 42. Third, the Navy received complaints from other recipients who, like Mr. Gomez, had never consented to receive the message. C.A.E.R. 175–76. Finally, Campbell-Ewald did nothing to verify that the "opt in" list was limited to the required age range and to those who had consented to receive text messages of this sort. J.A. 59–61, 64–68.

B. Proceedings Below

Mr. Gomez filed a class-action complaint against Campbell-Ewald, alleging that it violated the TCPA by sending text messages to nonconsenting recipients. J.A. 16–24. Mr. Gomez sued on behalf of himself and others who had been spammed by Campbell-Ewald. J.A. 20. His demand for relief sought an order certifying the class; actual and statutory damages for himself and the class; an injunction requiring Campbell-Ewald to "cease all

wireless spam activities"; reasonable attorneys' fees and costs; and "further and other relief the Court deems reasonable and just." J.A. 23.[2]

Campbell-Ewald moved to dismiss under Rule 12(b)(6). Its motion did not invoke "derivative sovereign immunity" and did not cite *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940). Instead, it argued that the Navy is not a "person" under the TCPA—and that because the TCPA does not create a cause of action against the Navy, it cannot supply a cause of action against anyone acting on the Navy's behalf. *See* Mem. Supp. Def.'s Mot. Dismiss at 7, ECF No. 6-1. The district court rejected this argument because there is no language in the TCPA exempting "persons" acting on behalf of non-"persons" from liability. *See* Order Re Def.'s Mot. Dismiss at 6–9, ECF No. 21. The Navy may not be a "person" under the TCPA, but Campbell-Ewald surely is. *Cf.* 42 U.S.C. § 1983 (authorizing lawsuits against state officers and agents, even though the State is not a "person" subject to liability under the statute).

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[2] After Mr. Gomez filed his complaint, Campbell-Ewald agreed to extend the deadline for filing the motion for class certification, and filed a joint stipulation declaring that:

> Campbell-Ewald agrees that it would be inefficient for the Court and the parties to expend resources on class certification-related activities before Defendant has responded to the Complaint and before any threshold motions are resolved and the pleadings are more settled.

See Stipulation To Move Date For Filing Motion For Class Certification at 2, ECF No. 9.

Then Campbell-Ewald filed its answer, asserting "derivative sovereign immunity" as an affirmative defense. *See* Def.'s Answer ¶ 38, ECF No. 23 ("Plaintiff's Complaint against C-E as an agent of the United States is barred by the doctrine of derivative sovereign immunity."). Campbell-Ewald did not assert qualified immunity (or any immunity other than "derivative sovereign immunity") in its answer, Rule 12(b)(6) motion, or motion for summary judgment.

After filing its answer, Campbell-Ewald made an offer of judgment under Rule 68, and tendered a separate settlement offer to Mr. Gomez. Each offered Mr. Gomez $1,503 for every unlawful text message he had received from Campbell-Ewald or its agents; payment of costs; and a stipulated injunction prohibiting Campbell-Ewald from violating the TCPA. Pet. App. 52a–61a. Neither offer included attorneys' fees, class certification, or class-wide relief. Mr. Gomez rejected these offers and moved to certify the class. Campbell-Ewald responded by moving to dismiss the case as moot under Rule 12(b)(1). The district court denied Campbell-Ewald's motion and deferred ruling on the motion for class certification. Pet. App. 35a–51a.

After discovery, Campbell-Ewald moved for summary judgment on the ground of "derivative sovereign immunity." Mem. Supp. Def.'s Mot. Summ. J. at 8–10, ECF No. 116. The district court granted the motion, holding that "[i]nasmuch as C–E acted on behalf of the Navy, it is . . . immune under the doctrine of derivative sovereign immunity." Pet. App. 30a. Mr. Gomez appealed, and the court of appeals reversed. Like the district court,

the court of appeals rejected Campbell-Ewald's mootness argument. Pet. App. 4a–7a. But it also rejected Campbell-Ewald's derivative-sovereign-immunity defense and remanded for further proceedings. Pet. App. 14a–20a. This Court granted certiorari.

SUMMARY OF ARGUMENT

1. The problems with Campbell-Ewald's mootness-by-offer-of-complete-relief theory have been well rehearsed. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532–37 (2013) (Kagan, J., dissenting); *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878 (7th Cir. Aug. 6, 2015) (Easterbrook, J.); Brief for the United States as Amicus Curiae at 10–15, *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013) (No. 11-1059). Yet the shortcomings of Campbell-Ewald's mootness argument extend beyond the defects that Justice Kagan, Judge Easterbrook, and the Solicitor General have already identified.

The first problem is Campbell-Ewald's concession that a district court may enter judgment for the plaintiff *after* the defendant has supposedly "mooted" the case by offering "complete relief." Pet. Br. 10, 21. That concession alone sinks Campbell-Ewald's mootness argument. If the district court retains the prerogative to enter a judgment, then by definition an Article III case or controversy continues to exist after the defendant offers "complete relief."

Perhaps Campbell-Ewald wants to leave open the possibility of judgment because it is absurd to think that a mere offer of complete relief requires a jurisdictional dismissal that sends the plaintiff home empty-handed.

But it is equally absurd to claim that a district court may enter judgment *after* a case has become moot. The mootness-by-offer-of-complete-relief theory is pinioned on the horns of this dilemma.

The second problem is that Campbell-Ewald's mootness argument rests entirely on its claim that Article III "demands adversity between the parties . . at all times." Pet. Br. 10. That premise is demonstrably untrue. Guilty pleas, consent decrees, confessions of error by the solicitor general, and ex parte litigation in which there is no adverse party at all—these are just a sampling of the many situations in which Article III jurisdiction co-exists with an absence of "adversity between the parties." And Campbell-Ewald says nary a word about *United States v. Windsor*, 133 S. Ct. 2675 (2013), which specifically holds that adverse parties are *not* required by Article III.

The third problem is that there is no authority from this Court that supports Campbell-Ewald's mootness-by-offer-of-complete-relief theory. The nineteenth-century cases on which Campbell-Ewald relies have nothing to do with Article III's case-or-controversy requirement; they establish only that a plaintiff who sues to collect a debt no longer has a viable claim after the defendant pays.

The fourth problem is that rejected or unaccepted settlement offers are not legally binding on the parties or the courts. *See Genesis Healthcare*, 133 S. Ct. at 1533–34 (Kagan, J., dissenting). Campbell-Ewald never denies this, but it also never explains how a rejected offer that has no legal effect can render a case moot. A

case becomes moot "only when it is *impossible* for a court to grant *any* effectual relief." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (emphasis added) (citation and internal quotation marks omitted). It remains possible for courts to grant relief after a defendant tenders an offer of settlement or judgment.

Finally, Campbell-Ewald is wrong to suggest that the district court could have forced Mr. Gomez to accept its offers by entering a judgment. A court may not compel a plaintiff to accept a settlement offer for anything less than his entire demand for relief—and Campbell-Ewald failed to offer the attorneys' fees or class-wide relief that Mr. Gomez had demanded. The only circumstance in which a district court may impose a forced entry of judgment is when the defendant "unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory." *Genesis Healthcare*, 133 S. Ct. at 1535–36 (Kagan, J., dissenting). Campbell-Ewald's offers do not meet that standard.

2. Even if Campbell-Ewald could somehow show that Mr. Gomez's individual claims have become moot, the class claims would remain live because Mr. Gomez retains an indisputable financial interest in the class-certification decision. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333–34 & n.6, 336 (1980); *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 874–75 (7th Cir. 2012). *Roper* also specifically disapproved the "pick-off" maneuver that Campbell-Ewald is attempting to deploy—a tactic that would allow defendants to perpetually evade class certification by tendering "complete

relief" to successive representative plaintiffs. 445 U.S. at 339. Campbell-Ewald has not asked this Court to repudiate any part of *Roper*, so *Roper*'s analysis should control here.

3. Campbell-Ewald's argument for "derivative sovereign immunity" fares no better. Sovereign immunity extends only to lawsuits brought against the sovereign; it does not protect employees or contractors who violate federal law while acting on the government's behalf. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Ex parte Young*, 209 U.S. 123, 159–60 (1908). Government agents might be able to assert *qualified* immunity for reasonable mistakes of law. *See Filarsky v. Delia*, 132 S. Ct. 1657 (2012). And contractors may have a preemption defense against *state*-law claims if their federal obligations require them to do something that state law proscribes. *See Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988); *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940). But none of that supports an absolute immunity for government employees or contractors who violate federal statutes in the scope of their employment or contractual duties. Indeed, the Westfall Act specifically withholds its immunity from federal employees who violate congressional enactments or the Constitution. *See* 28 U.S.C. § 2679(b)(2).

Even if Campbell-Ewald could convince this Court to invent a new "immunity" for federal contractors who violate federal statutes, Campbell-Ewald would *still* lose because the Navy never authorized anyone to send text messages in violation of the TCPA. Campbell-Ewald's contract with the Navy required compliance "with all

applicable Federal . . . laws." J.A. 220. And the Navy specifically instructed Campbell-Ewald to send text messages *only* to those who had "opted in" to receive them. J.A. 42–45. Even if "derivative sovereign immunity" exists, it cannot possibly extend to acts that violate both federal law *and* the Navy's explicit instructions.

ARGUMENT

I. AN OFFER OF "COMPLETE RELIEF" DOES NOT MOOT A CASE

A. Campbell-Ewald's Concession That A District Court May Enter Judgment After An Offer Of "Complete Relief" Destroys Any Claim That The Offer Moots The Case

Campbell-Ewald admits that a district court may "enter[] judgment" after the defendant offers "complete relief." Pet. Br. 10, 21. That concession is incompatible with its claim that an offer of complete relief "eliminates an Article III case and controversy" and renders the case moot. Pet. Br. 10. Mootness deprives a district court of subject-matter jurisdiction,[3] and a district court that lacks subject-matter jurisdiction may not, under any circumstance, enter a judgment. *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court *must* dismiss the ac-

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[3] *See Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983) ("Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies.").

tion." (emphasis added)); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (citation and internal quotation mark omitted)); *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878, *3 (7th Cir. Aug. 6, 2015) ("[A] district court cannot enter judgment in a moot case."). By admitting that the district court retains the authority to enter judgment after the defendant offers "complete relief," Campbell-Ewald has conceded defeat on the first question presented.

Campbell-Ewald tries to salvage its case by denying that a district court must enter a jurisdictional dismissal when a case becomes moot. Pet. Br. 21. Instead, Campbell-Ewald suggests that jurisdictional dismissal is only "the typical course" (rather than the mandatory course) when a case becomes moot before entry of judgment:

> When a court determines that a case is moot, the typical course is to order dismissal of the case. *See, e.g., United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); Pet. 14 (citing cases).

Pet. Br. 21. That statement is imprecise and misleading. *Munsingwear*'s non-absolute preference for vacatur and dismissal governs only how an *appellate* court should respond when a case becomes moot *while on appeal*:

> The established practice of the Court in dealing with a civil case from a court in the federal system *which has become moot while on its*

> *way here or pending our decision on the merits* is to reverse or vacate the judgment below and remand with a direction to dismiss.

340 U.S. at 39 (emphasis added). *Munsingwear* has nothing to say about a district court's unflagging duty to dismiss cases that become moot *before* entry of judgment.

Campbell-Ewald is equally off base when it suggests that *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), permits district courts to "dispose[] of moot cases in the manner most consonant to justice." Pet. Br. 21 (quoting *Bancorp*, 513 U.S. at 24 (internal quotation marks omitted)). Campbell-Ewald is quoting this Court out of context. *Bancorp* (like *Munsingwear*) involved a case that became moot while on appeal. *See* 513 U.S. at 21. And *Bancorp* (like *Munsingwear*) addressed only whether an *appellate* court should vacate lower-court rulings that had been entered before the case became moot. *See id.* at 21–29. Whatever latitude an appellate court may enjoy when a case becomes moot *after* the entry of judgment, there remains only one possible disposition when a case becomes moot *before* entry of judgment—and that is to dismiss for lack of subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3). Nothing in *Bancorp* or *Munsingwear* changes or undermines that ironclad rule of federal-court practice.

Even if it were possible to construe *Bancorp* or *Munsingwear* as permitting district courts to enter judgment in moot cases, this Court should avoid interpreting its opinions in a manner that contradicts the federal rules of civil procedure. Rule 12(h)(3) is unequivocal:

A federal district court "*must dismiss* the action" if it "determines at any time that it lacks subject-matter jurisdiction." Fed. R. Civ. P. 12(h)(3) (emphasis added). Permitting district courts to enter judgments after a case becomes moot would place this Court's case law at odds with the rules of civil procedure that this Court prescribes. The Court makes every effort to avoid these types of conflicts. *See Gasperini v. Ctr. for Humanities Inc.*, 518 U.S. 415 (1996). Yet Campbell-Ewald does not even acknowledge Rule 12(h)(3), let alone explain how Rule 12(h)(3) could survive its revisionist interpretations of *Bancorp* and *Munsingwear*.

Finally, Campbell-Ewald never offers any rule, standard, or criteria for determining when a district court should enter judgment for the plaintiff, rather than a jurisdictional dismissal that sends the plaintiff home empty-handed. All that Campbell-Ewald says is that dismissal is the "typical course," but that district courts "may also dispose of the case by entering judgment according to the terms of the offer of complete relief." Pet. Br. 21. That appears to leave the district court with unfettered discretion to choose between these two dispositions. *Bancorp* and *Munsingwear* won't provide any guidance; those rulings govern only how an appellate court resolves cases that become moot while on appeal. And Campbell-Ewald will not even say whether the district court in *this* case should have entered judgment for Mr. Gomez or dismissed for lack of jurisdiction. It is not clear that Campbell-Ewald's proposed regime would even comply with constitutional due-process requirements. *See Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)

("The touchstone of due process is protection of the individual against arbitrary action of government." (citation omitted)). And even if it did, this Court should be loath to confer such arbitrary powers on the federal courts.

Campbell-Ewald correctly observes that some *lower* courts have held that an offer of "complete relief" both moots a case and permits the district court to enter judgment. Pet. Br. 21 (citing *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 574–75 (6th Cir. 2009)). Those decisions are wrong; they violate Rule 12(h)(3) and the rulings from this Court that require district courts to dismiss cases immediately when they lack subject-matter jurisdiction. *See Steel Co.*, 523 U.S. at 94. Campbell-Ewald makes no effort to defend the reasoning of these lower-court decisions—nor does it defend the notion that a district court may enter judgment after a case has become moot. Instead, it acts as though the brute fact that some lower courts have endorsed this self-refuting idea should lead this Court to do the same. That is a wish, not an argument. The mere observation that courts have permitted entry of judgment after concluding that a case has become moot does not supply a *reason* for this Court to follow their example.

B. A Case Does Not Become Moot Simply Because The Parties No Longer Dispute The Relief That Should Be Awarded

Even if Campbell-Ewald could escape or retract its fatal concession that a district court retains authority to enter judgment after an offer of "complete relief," the Court should reject Campbell-Ewald's mootness argument for another reason: Campbell-Ewald is wrong to

assert that an Article III case or controversy vanishes when the defendant capitulates and offers the plaintiff everything he demands. Such unilateral surrender might justify the entry of *judgment*, but it does not remove jurisdiction or eliminate an Article III case or controversy.

Consider the criminal-law equivalent of an "offer of complete relief": a defendant who pleads guilty and agrees to the maximum allowable sentence. *See* Fed. R. Crim. P. 11(a)(1), (c). In that situation, there is no longer "adversity" between the parties, and the defendant has "thrown in the towel" by offering the government everything it could obtain after a trial. Pet. Br. 16 (citations and internal quotation marks omitted). But that does not eliminate an Article III case or controversy, and it does not allow the district court to dismiss the prosecution as moot and allow the defendant to walk free. Instead, the district court retains jurisdiction and proceeds to enter a judgment of conviction. *See* Fed. R. Crim. P. 32(k).

It is hard to see why matters should be different in the civil context. If a civil defendant surrenders and offers the plaintiff everything in his demand for relief, that might justify entry of judgment but it does not render the case moot. Each component of Article III's case-or-controversy requirement—injury in fact, causation, and redressability—is unaffected by the defendant's offer. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). A mere *offer* of "complete relief" does not remove the injury that the plaintiff suffered; it does not change the fact that the defendant caused the injury; and it does not disable the courts from redressing that injury with judicial relief. Campbell-Ewald never so much as men-

tions these requirements of the case-or-controversy doctrine, nor does it explain how any of them is undermined by an offer of "complete relief."

Instead, Campbell-Ewald claims that Article III "demands adversity between the parties . . . at all times," and that when parties no longer lock horns over the relief sought, the federal judicial power comes to an end. Pet. Br. 10. There are many problems with this understanding of Article III's case-or-controversy requirement.

The first problem is that it would render the federal courts powerless to enter consent decrees, dismiss settled cases with prejudice, retain jurisdiction over a settlement agreement, or enter judgment after a litigant accepts a Rule 68 offer. Once parties to a case settle, there is no longer "adversity" between the parties. But if that eliminated an Article III case or controversy, then the federal courts would lack jurisdiction to do anything except dismiss the case without prejudice. *See Steel Co.*, 523 U.S. at 94; *Frederiksen v. City of Lockport*, 384 F.3d 437, 438 (7th Cir. 2004) (Easterbrook, J.) ("'No jurisdiction' and 'with prejudice' are mutually exclusive."). Yet it is common for federal courts to dismiss settled cases with prejudice, and the rules of civil procedure allow them to do so. *See* Fed. R. Civ. P. 41(a)(2); *see also* Fed. R. Civ. P. 68(a) (requiring courts to enter judgment after a litigant accepts a Rule 68 offer). Courts may also enter consent decrees upon settlement and retain jurisdiction to enforce the parties' settlement agreement. *See Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992) (consent decrees); *Kokkonen v. Guardian Life Ins. Co. of*

Am., 511 U.S. 375, 381 (1994) (retaining jurisdiction over settlement agreements). But if Campbell-Ewald were right to assert that subject-matter jurisdiction disappears at the moment the parties reach quiescence, then a district court could never do any of this. It would be compelled to enter an immediate jurisdictional dismissal upon settlement of the parties.

Another problem is that this Court has repeatedly rejected Campbell-Ewald's claim that Article III requires "adversity between the parties at all times." Pet. Br. 10. *Tutun v. United States*, 270 U.S. 568 (1926), upheld the federal courts' jurisdiction over uncontested naturalization proceedings. And this Court has decided cases after the Solicitor General confessed error and joined the "opposing" party in asking this Court to reverse the judgment below. *See United States v. Providence Journal Co.*, 485 U.S. 693, 703–04 (1988).

Then there is *United States v. Windsor*, 133 S. Ct. 2675 (2013), which declared the Defense of Marriage Act unconstitutional even though the parties in that case were decidedly non-adverse.[4] *Windsor* is especially problematic for Campbell-Ewald because it explicitly holds that adverse parties are *not* required by Article III. *See id.* at 2685, 2687–88; *id.* at 2701–02 (Scalia, J., dissenting). True, *Windsor* acknowledges the absence of adversity as a "prudential" jurisdictional factor. *Id.* at 2687. But that is no help to Campbell-Ewald, which stakes its

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[4] The Bipartisan Legal Advisory Group (BLAG) had intervened to defend the statute, but the Court did not rely on BLAG's presence in its Article III analysis. *See Windsor*, 133 S. Ct. at 2684–87, 2688.

argument exclusively on Article III and makes no pretense of relying on "prudential" considerations of justiciability. *See* Pet. Br. 16 ("[A] defendant's tender of the relief sought eliminates an Article III controversy."); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) ("[P]rudential" justiciability factors are "not derived from Article III").

Article III courts also entertain ex parte litigation in which there is no opposing party at all. Federal statutes have authorized ex parte cases of this sort since the beginning of the republic. *See* Act of April 14, 1792, ch. 24, § 1, 1 Stat. 254 (salvage cases); Act of January 29, 1795, 1 Stat. 414 (naturalization proceedings); 15 U.S.C. § 1116(d)(1)(A) (federal courts may seize trademark-infringing goods "upon ex parte application"); *see also* Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 Sup. Ct. Rev. 123, 132–36; James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 Yale L.J. 1346, 1349–91 (2015) (collecting examples). And the Foreign Intelligence Surveillance Act requires the government to seek surveillance warrants in closed-door ex parte proceedings before an Article III tribunal. *See* 50 U.S.C. § 1803; *id.* § 1803(b) (authorizing ex parte appeals of decisions denying a FISA warrant).

If Campbell-Ewald wants this Court to overrule *Tutun*, *Windsor*, and every case decided by this Court after the Solicitor General confessed error, and if it wants this Court to nullify the Foreign Intelligence Surveillance Act and every statute authorizing ex parte litigation in Arti-

cle III courts, then it should say so. Otherwise, Campbell-Ewald should abandon its claim that "Article III's case-or-controversy requirement demands adversity between the parties . at all times." Pet. Br. 10. As Professor Monaghan has observed:

> [I]t is difficult to assert that "real" adversaries are necessary to the existence of a case or controversy; witness, for example, default judgments, guilty pleas, consent decrees, confessions of error by the solicitor general, naturalization and bankruptcy proceedings—situations where the parties have something to gain or lose, but where they agree on the facts and/or the law.

Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1373–74 (1973) (footnote omitted).

C. There Is No Authority From This Court That Supports Campbell-Ewald's Mootness-By-Offer-Of-Complete-Relief Theory

Campbell-Ewald not only ignores the cases that reject an adverse-party requirement, it also fails to produce any cases from this Court that support its mootness-by-offer-of-complete-relief theory. The closest thing to support that Campbell-Ewald can muster is a trio of cases from the nineteenth century. Pet. Br. 16–18 (citing *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308 (1893); *San Mateo Cnty. v. Southern-Pacific R.R. Co.*, 116 U.S. 138 (1885); *Little v. Bowers*, 134 U.S. 547 (1890)). None of these rulings rely on Article III's case-

or-controversy requirement. And each long predates the modern case-or-controversy doctrine established by this Court. The idea of "injury in fact" as an Article III requirement did not appear in this Court's case law until *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151–52 (1970)—and the concepts of "causation" and "redressability" emerged even later than that. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 169, 183–91, 193–95 (1992). Before *Data Processing*, judicial inquiries into "standing" had focused on whether the law provided a cause of action—a question that is today regarded as going to the merits rather than whether an Article III case or controversy exists. *See id.* at 170–71, 173–78; *see also Steel Co.*, 523 U.S. at 96 ("[N]onexistence of a cause of action was no proper basis for a jurisdictional dismissal.").

San Pablo, *San Mateo County*, and *Little* each dismissed writs of error after a taxpayer had paid a disputed debt. The writs were dismissed not because the payments eliminated an Article III case or controversy, but because "the cause of action had ceased to exist." *San Pablo*, 149 U.S. at 313; *see also San Mateo Cnty.*, 116 U.S. at 142 ("[T]here is no longer an existing cause of action in favor of the county against the railroad company."); *Little*, 134 U.S. at 558 (relying on *San Mateo County*'s conclusion that "there was no longer an existing cause of action" after disputed taxes have been voluntarily paid). Failure to establish a cause of action goes to the merits; it does not affect whether an Article III case or controversy exists. *See Bell v. Hood*, 327 U.S.

678, 682 (1946) ("[F]ailure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.").

Payment of a debt is a defense on the merits—not something that eliminates an Article III case or controversy. *See* Fed. R. Civ. P. 8(c) (listing "payment" as an affirmative defense). Payment may require the litigation to end,[5] but that is not because jurisdiction ceases to exist. The litigation ends because a plaintiff is *not legally entitled* to judicial relief once the defendant has paid the disputed debt. A claim can be a dead loser—in the sense that the law forecloses judicial relief—yet still satisfy Article III's case-or-controversy requirement. *See Gen. Inv. Co. v. N.Y. Cent. R.R. Co.*, 271 U.S. 228, 230 (1926) ("There may be jurisdiction and yet an absence of merits . . "). So long as it remains theoretically possible for a court to redress an alleged injury, even if the law or the facts do not permit such relief, the Article III case-or-controversy requirement is satisfied. *See Chafin v. Chafin*, 133 S. Ct. 1017, 1020 (2013) ("[P]rospects of success are . . . not pertinent to the mootness inquiry."); Oral Argument at 15:13, *Chapman*, Nos. 14-2773, 14-2775, 2015 WL 4652878, *available at* http://1.usa.gov/1MneCSu (last visited on Aug. 24, 2015) (Judge Easterbrook: "What you say is that the Court *shouldn't* award that relief, not that the Court *can't*. And mootness is supposed to be about

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[5] This is especially true in tax cases where a defendant has a right to pay its taxes unilaterally. *See San Pablo*, 149 U.S. at 312 (quoting state statute that entitled a taxpayer to extinguish its debt by depositing money in the bank in the creditor's name).

whether relief is possible, not whether it's desirable or sensible.").

To be sure, *San Pablo* goes on to say that the Court is "not empowered to decide moot questions or abstract propositions." 149 U.S. at 314; Pet. Br. 17 (quoting this passage). But the Court was not saying that the *case* had become "moot" in an Article III sense. It said that the railroad's payment made it unnecessary to opine on the legality of the tax. That was the "question" that had become "moot"—in the sense of becoming irrelevant to the outcome because either way the State would not be entitled to judicial relief. *San Pablo* is not an Article III holding, but a reflection of this Court's longstanding refusal to resolve constitutional or legal issues absent a need to do so. *Cf. Blair v. United States*, 250 U.S. 273, 279 (1919) ("Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function ... "). The same goes for *San Mateo County* and *Little*.[6]

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[6] *Massachusetts v. EPA* cites *San Pablo* to support the indisputable proposition that there is no justiciable controversy when a case becomes moot. *See* 549 U.S. 497, 516 (2007). This passing reference to *San Pablo* does not convert its holding into something it is not.

D. An Unaccepted Offer Cannot Moot A Case Because It Is Not Legally Binding On The Parties Or The Courts

There is yet another insurmountable problem with Campbell-Ewald's mootness-by-offer-of-complete-relief theory: An unaccepted offer of settlement or judgment cannot redress a plaintiff's injuries because unaccepted offers do not bind the parties or the courts. *See Genesis Healthcare*, 133 S. Ct. at 1533–34 (Kagan, J., dissenting); Brief for the United States as Amicus Curiae at 10, *Genesis Healthcare*, 133 S. Ct. 1523 (2013) (No. 11-1059).

Rule 68(b) provides that "[a]n unaccepted offer is considered withdrawn" if not accepted within 14 days. Fed. R. Civ. P. 68(b). And contract law provides that a rejected offer "leaves the matter as if no offer had ever been made." *Minneapolis & St. Louis Ry. Co. v. Columbus Rolling Mill Co.*, 119 U.S. 149, 151 (1886). Neither the plaintiff nor the courts can enforce an unaccepted or rejected offer of settlement or judgment. That means the plaintiff's injuries remain unredressed, leaving him in the same position he was in before the offer was made.

Mr. Gomez rejected Campbell-Ewald's offers, and Campbell-Ewald never denies that its rejected offers are legally unenforceable. Pet. Br. 22–24.[7] But it never explains how an unenforceable offer redressed Mr. Gomez's

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[7] Campbell-Ewald is wrong to say that "an offer of complete relief puts the plaintiff in a far better position than a default." Pet. Br. 24. A default judgment is legally enforceable; an offer of complete relief is not.

injuries. If this case were dismissed as moot in response to Campbell-Ewald's offers, Mr. Gomez would have no means of compelling Campbell-Ewald to pay damages or abide by its proposed injunction. Yet Campbell-Ewald insists throughout its brief that continued adjudication would no longer "affect the result." Pet. Br. 14, 16–17, 20 (quoting *San Pablo*, 149 U.S. at 314). That is demonstrably untrue; judicial resolution would transform an *unenforceable* offer of "complete relief" into an *enforceable* judgment of the court. That is hardly an "academic" difference. Pet Br. 13; *see also Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) ("A case becomes moot only when it is *impossible* for a court to grant *any* effectual relief whatever to the prevailing party." (emphasis added) (citation and internal quotation marks omitted)).[8]

Campbell-Ewald insists that it would gladly pay Mr. Gomez the money that it offered, even in the absence of legal compulsion. *See* Pet. Br. 21, 22 n.6. Campbell-Ewald's generosity does nothing to help its argument for mootness. First, Campbell-Ewald claims that an offer of "complete relief" *always* moots a case—regardless of

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[8] What's more, even if Campbell-Ewald's rejected offers could somehow be enforced as contractual obligations (or under promissory estoppel), that *still* is not as valuable to Mr. Gomez as a court judgment. A contractual entitlement provides only a cause of action on which one can sue. A judgment, by contrast, is judicially enforceable without the need to file and win another lawsuit. *See Kokkonen*, 511 U.S. at 381–82; *Zinni v. ER Solutions, Inc.*, 692 F.3d 1162, 1166–68 (11th Cir. 2012). So Mr. Gomez would still retain a "personal stake" in the litigation.

whether the defendant plans or promises to donate money to the plaintiff after the case is dismissed. *See* Pet. Br. 10 ("Offering a plaintiff everything he could secure through a judgment in his favor eliminates both the requisite adversity and personal stake, and thus eliminates an Article III case and controversy."). The question presented refers only to "an offer of complete relief"—not "an offer of complete relief accompanied by a good-faith intention to abide by the terms of such offer after the case is dismissed." Pet. Br. i. If Campbell-Ewald must rely on its (non-binding) assurance that it will pay Mr. Gomez, then the answer to the first question presented must be "no": A mere offer of "complete relief" does *not* render a case moot.

Second, there is *still* a distinction between non-binding intentions and legally binding commitments. One can assume that Campbell-Ewald is acting in good faith when it says that it will pay Mr. Gomez and abide by the terms of the proposed injunction. *See* Pet. App. 55a–56a; 60a–61a. But that statement does not bind future management, and if it chooses to renege Mr. Gomez will be unable to seek contempt sanctions or sue for breach of contract. That alone shows that Mr. Gomez—and every plaintiff who rejects an offer of "complete relief"—retains a "personal stake" in the litigation. The court's continued adjudication will "affect the result" by converting a non-binding expression of intent into a legally enforceable judgment. Indeed, that is precisely why this Court refuses to issue mootness dismissals in response to a defendant's "voluntary cessation" of challenged conduct. *See Knox*, 132 S. Ct. at 2287 ("The voluntary cessa-

tion of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed.").

Campbell-Ewald's next move is to suggest that even if its offer is legally unenforceable, *San Pablo* holds that a case becomes moot if "the defendant's tender would provide the plaintiff complete relief—*regardless* of whether the plaintiff has accepted the offer." Pet. Br. 22. *San Pablo* holds no such thing. It was the *payment* of the debt that led that *San Pablo* to declare that "the cause of action has ceased to exist." 149 U.S. at 313. The relevant passage provides:

> Any obligation of the defendant to pay to the state the sums sued for in this case, together with interest, penalties, and costs, has been extinguished by the offer to pay all these sums, *and* the deposit of the money in a bank, which by a statute of the state have the same effect as actual payment and receipt of the money; and the state has obtained everything that it could recover in this case by a judgment of this court in its favor.

Id. at 313–14 (emphasis added). The passage uses "and" to conjoin the offer, the payment and receipt of the money, and the State's recovery of everything it could obtain in court. And of course, as we have already explained, *San Pablo*'s disposition did not even rely on Article III. The taxpayer's payment eliminated a viable cause of action, which is a far cry from eliminating an Article III case or controversy. *See* Part I.C, *supra*.

Finally, even an *accepted* offer of settlement does not moot a case. Settlement allows courts to dismiss with prejudice, which is impermissible after a case has become moot. *See supra* at 20–21. What's more, Rule 68(a) *requires* a court to enter judgment after a litigant accepts a Rule 68 offer; if the case becomes moot upon acceptance of that offer, then Rule 68(a) is unconstitutional. And if someone tries to re-litigate a claim that has settled, that effort is precluded by res judicata or accord and satisfaction, not by lack of an Article III case or controversy. *See Chapman*, 2015 WL 4652878, at *7 ("[E]ven a defendant's proof that the plaintiff has *accepted* full compensation ('accord and satisfaction' in the language of Rule 8(c)(1)) is an affirmative defense rather than a jurisdictional bar "). One should not confuse a judicial duty to conclude the litigation with a lack of jurisdiction over the controversy.[9]

E. The Courts Have No Authority To Impose A Forced Entry Of Judgment In Response To Campbell-Ewald's Offers

Nothing we have said to this point addresses whether a court may enter *judgment* after an offer of "complete relief." We have considered only whether an offer of complete relief eliminates an Article III case or controversy and renders the case moot—the sole issue in the

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[9] To the extent that previous opinions assume or suggest that settlement "moots" a case, we respectfully ask the Court to clarify that it does not. *See Genesis Healthcare*, 133 S. Ct. at 1529 n.4; *Bancorp*, 513 U.S. at 20; *Roper*, 445 U.S. at 332.

first question presented. But Campbell-Ewald suggests that the district court might have entered judgment for Mr. Gomez in response to its offers. Pet. Br. 10, 21. This is mistaken, and the Court should soundly reject any possibility of a forced entry of judgment (or forced settlement) on remand.

There may be rare situations in which courts may override litigant autonomy and force a plaintiff to accept a settlement or entry of judgment against his wishes. The only circumstance in which that is appropriate, however, is when a defendant "unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory." *Genesis Healthcare*, 133 S. Ct. at 1535–36 (Kagan, J., dissenting). It is hard to imagine this would ever happen, given Rule 68(d)'s cost-shifting provision. But a spiteful or judgment-proof litigant might be willing to incur those costs, and a court need not entertain bootless litigation at public expense.

There is no justification whatsoever for a forced entry of judgment in *this* case. First, Campbell-Ewald's offers failed to meet Mr. Gomez's demands for relief. Neither offer consented to class certification, and neither offer provided the attorneys' fees that Mr. Gomez had demanded. Pet. App. 52a–56a; 57a–61a. "Complete relief" is defined by what the plaintiff demands, not by what the defendant thinks the plaintiff is entitled to recover. *See Smith v. Greystone Alliance, LLC*, 772 F.3d 448, 451 (7th Cir. 2014) (Easterbrook, J.) ("[A] court must resolve the merits unless the defendant satisfies the plaintiff's demand. An offer that the defendant or the judge believes sufficient, but which does not satisfy the

plaintiff's demand, does not justify dismissal."). Campbell-Ewald's proposed injunction also falls short of complete relief. Mr. Gomez demanded an injunction against "all wireless spam activities"; Campbell-Ewald offered a vague obey-the-law injunction that merely restates the TCPA's prohibitions. Pet. App. 56a, 61a; *see also* Brief of Amicus Legal Aid Soc'y of the District of Columbia et al.; *EEOC v. AutoZone, Inc.*, 707 F.3d 824 (7th Cir. 2013) (obey-the-law injunctions not judicially enforceable).

Campbell-Ewald's offers fall short of "complete relief" for yet another reason: Mr. Gomez sued as a class representative and demanded class-wide relief. J.A. 16–17 ("Gomez brings this class action complaint to obtain redress for all persons injured by [Campbell-Ewald's] conduct."). It is specious for Campbell-Ewald to suggest that offering relief only to one member of that putative class constitutes "complete relief" requiring a forced entry of judgment. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 341 (1980) (Rehnquist, J., concurring) (when a defendant offers a plaintiff seeking to proceed as a class representative individual relief only, "the defendant has not offered all that has been requested in the complaint (*i.e.*, relief for the class)"). If Campbell-Ewald wants Mr. Gomez to abandon his quest for class-wide relief in exchange for payment, then it must bargain for that consistent with principles of mutual assent. *See Genesis Healthcare*, 133 S. Ct. at 1536 (Kagan, J., dissenting).[10]

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[10] *See Tanasi v. New All. Bank*, 786 F.3d 195, 200 (2d Cir. 2015) ("[T]he district court should not enter judgment against the defend-

(continued...)

Second, Mr. Gomez had good reason for rejecting Campbell-Ewald's settlement offer: He sued as the representative of a class, and no suitable class representative would cut a deal that gives himself full recovery at the expense of the class members that he seeks to represent. Indeed, any class representative who accepts such a "bargain" would flunk Rule 23's adequacy-of-representation requirement. *See* Fed. R. Civ. P. 23(a)(4) (representative parties must "fairly and adequately protect the interests of the class."). Campbell-Ewald tries to paint Mr. Gomez's rejection of its settlement offers as something akin to champerty and maintenance. But it is the very nature of *representative* litigation for the lead plaintiff to pursue recovery *for the class*—even if that comes at some cost or delay to his personal recovery. Having presented himself to the court as an adequate representative of those injured by Campbell-Ewald, Mr. Gomez cannot turn around and accede to a deal that gives himself a full recovery while his fellow class members go begging. And there is no basis for Campbell-Ewald to equate the rejection of its offers with the liti-

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ant if it does not provide complete relief," including relief on the plaintiffs' class claims); *Charvat v. Nat'l Holdings Corp.*, No. 2:14-cv-2205, 2015 WL 3407657, *7 (S.D. Ohio May 26, 2015) ("Plaintiff's *demand* ... includes the relief sought on behalf of the putative class—regardless of whether Plaintiff has a legal interest in representing the class before it is certified," and a settlement proposal that offers relief only on the plaintiff's individual claims "does not purport to satisfy that demand" and "does not mandate that the Court enter judgment in Plaintiff's favor over his objection.").

gious or intransigent behavior that might justify a forced entry of judgment.

Third, Mr. Gomez has material interests in continuing the litigation. If a class is certified, Mr. Gomez can share the lawyers' bill with other class members rather than bearing those costs by himself. *See Roper*, 445 U.S. at 333–34 & n.6. Mr. Gomez also stands to recover an incentive award as the class representative if the case settles. *See Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 874–75 (7th Cir. 2012). It is up to Mr. Gomez to decide whether to give up these pursuits in exchange for Campbell-Ewald's settlement offer. No federal court has the authority to make that decision for him.

Finally, even if the district court had forced Mr. Gomez to accept judgment on his individual claims, that would not render those individual claims "moot." Campbell-Ewald thinks that a forced entry of judgment would remove jurisdiction and eliminate an Article III case or controversy. Pet. Br. 22 ("The entry of such a judgment itself ends any 'live' controversy."). That is wrong. Entry of judgment may conclude the litigation, but it does not affect subject-matter jurisdiction over the claims. If Mr. Gomez tried to reinstitute his individual claims after the forced entry of judgment, they would be barred by res judicata, not for lack of jurisdiction. Mr. Gomez would still be alleging a claim that arises under federal law, and he would satisfy Article III by alleging an injury (an unlawful text message), caused by Campbell-Ewald, that *could* be redressed with judicial relief (damages). That he has already litigated and prevailed is a preclusion defense that goes to the merits, not to whether a case or

controversy exists. *See Ill. Cent. R.R. Co. v. Adams*, 180 U.S. 28, 32 (1901). So even if the district court had entered judgment on Mr. Gomez's individual claims, that would not "moot" those claims, and it would not allow Campbell-Ewald to argue that *Genesis Healthcare* moots the class claims as well.

For good measure, a forced entry of judgment on Mr. Gomez's individual claims would not moot the class claims either. *Roper* allowed a class representative to appeal a denial of class certification—*after* the district court had imposed a forced entry of judgment on the representative's individual claims. *See Roper*, 445 U.S. at 329–30. *Roper* held that the representative retained an Article III stake in the class-certification decision because certification would allow him to share the lawyers' bill with the other class members. *See id.* at 333–34 & n.6. Mr. Gomez would retain the same Article III interest in seeking class certification from the district court after a forced judgment on his individual claims.[11]

II. CAMPBELL-EWALD'S OFFERS DO NOT MOOT THE CLASS CLAIMS

Campbell-Ewald's analysis of the second question assumes that an offer of "complete relief" moots a case. It further assumes that its offers to Mr. Gomez qualified as

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[11] Mr. Gomez moved for certification on January 19, 2011, before any court had entered judgment, and *Roper* would allow certification to "relate back to the time of the original motion for certification." 445 U.S. at 330 n.3.

"complete relief" that mooted his individual claims. Each of those assumptions is false. *See* Part I, *supra*. So there is no need to rule on whether a not-yet-certified class claim can save an otherwise moot case. But even if one *assumes* that Mr. Gomez's individual claims became "moot," Campbell-Ewald *still* cannot show that the class claims are moot.

Mr. Gomez retains two material interests in the class-certification decision. First, certification will allow Mr. Gomez to share the lawyers' bill with other class members. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333–34 & n.6. Second, certification will allow Mr. Gomez to seek an incentive award if the case settles. *See Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 874–75 (7th Cir. 2012) (Posner, J.). Campbell-Ewald never denies that Mr. Gomez holds these financial stakes in the class-certification decision. But it never explains why these interests cannot preserve the Article III case or controversy that existed at the outset of the lawsuit. The cases that it cites (including *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013)) do not consider or resolve whether these financial interests can sustain a representative's class claims after his individual claims become moot.

Campbell-Ewald bears the "heavy" burden of demonstrating mootness. *Cnty. of L.A. v. Davis*, 440 U.S. 625, 631 (1979). So it must address Mr. Gomez's undeniable financial interests in certification. And it must do so in light of the distinction between mootness and standing; mootness doctrine is more likely to allow probabilistic or speculative injuries to sustain a case or controversy. *See*

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189–92 (2000).

Campbell-Ewald's argument for mootness is also foreclosed by *Roper*'s specific disapproval of its efforts to evade class certification by offering "complete relief" to the representative plaintiff:

> Requiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

445 U.S. at 339. Campbell-Ewald is trying to do exactly what *Roper* disapproved: Decapitate the class by mooting out the representative's claims before the district court can rule on certification—and then repeat the cycle as soon as a new representative plaintiff emerges.[12]

Campbell-Ewald does not ask the Court to overrule *Roper*, and it does not even acknowledge this passage from *Roper*. Instead, Campbell-Ewald acts as if *Genesis Healthcare* compels dismissal if Mr. Gomez's individual

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[12] Campbell-Ewald also induced the district court to delay its certification decision by stipulating to an extension of Mr. Gomez's deadline for filing his motion for class certification. *See supra* at 8 n.2. Campbell-Ewald's effort to moot the case during that agreed-upon window of time borders on sandbagging.

claims became moot before certification. Pet. Br. 26–28. But *Genesis Healthcare* holds only that a plaintiff whose claims become moot may not pursue a collective action under the Fair Labor Standards Act. *See* 29 U.S.C. § 216(b) (allowing an employee to sue on behalf of himself and "other employees similarly situated."). *Genesis Healthcare* did not overrule *Roper*, and it avoided any collision with *Roper* by insisting throughout its opinion that *class* actions under Rule 23 were distinguishable from *collective* actions under the FLSA. *See* 133 S. Ct. at 1529 ("[C]ases that [arise] in the context of [Rule] 23 class actions . . . are inapposite . . . because Rule 23 actions are fundamentally different from collective actions under the FLSA."); *see also id.* at 1527 n.1 ("[T]here are significant differences between certification under [Rule] 23 and the joinder process under § 216(b)."); *id.* at 1532 (distinguishing *Roper* by limiting it "to the unique significance of certification decisions in class-action proceedings"); *id.* ("Whatever significance 'conditional certification' may have in § 216(b) proceedings, it is not tantamount to class certification under Rule 23."). More importantly, *Genesis Healthcare* never considered or addressed whether a representative plaintiff *with a financial stake* in the class-certification decision may seek certification after his individual claims become moot.

Campbell-Ewald refuses to acknowledge these statements from *Genesis Healthcare* and insists that class actions are indistinguishable from FLSA collective actions. Pet. Br. 11, 27–28. Indeed, Campbell-Ewald goes so far as to alter a passage from *Genesis Healthcare* by replacing "collective-action allegations" with "[class]-

action allegations." Pet. Br. 29. Campbell-Ewald cannot maintain that stance when *Genesis Healthcare* took such pains to distinguish the collective action in that case from the class action at issue in *Roper*. Campbell-Ewald would have us believe that *Genesis Healthcare*'s efforts to distinguish class actions were all tongue-in-cheek—and that the Court's opinion should be construed to repudiate an opinion that it went out of its way to distinguish.

We recognize that *Genesis Healthcare* described as "dictum" the passage from *Roper* that disapproved Campbell-Ewald's "pick off" maneuver—even as it distinguished *Roper* as inapplicable to collective actions brought under the FLSA. *See* 133 S. Ct. at 1532. But Campbell-Ewald does not urge that *Roper* be disregarded on that ground. And even if this passage from *Roper* could be characterized as "dictum," Campbell-Ewald must still present an *argument* for why this supposed dictum should be ignored. The burden of persuasion always rests with the litigant who is urging the Court to depart from its prior opinions. *See Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("[A]ny departure from the doctrine of *stare decisis* demands special justification."). It would be extraordinary for this Court to overrule or cut back on *Roper* when: (1) Campbell-Ewald has not asked the Court to reconsider *any* part of *Roper*;[13] (2) Campbell-Ewald presents no argument criticizing *Roper*'s analysis; and (3) *Genesis Healthcare* went out of its way

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[13] *See Bank of America, N.A. v. Caulkett*, 135 S. Ct. 1995, 1999–2000 & n. (2015) (refusing to reconsider *Dewsnup v. Timm*, 502 U.S. 410 (1992), because the petitioners did not ask the Court to overrule it).

to distinguish *Roper* as a case involving class actions rather than collective actions under the FLSA.

Finally, a comment on Campbell-Ewald's "[p]olicy concerns about class action practice"—which it acknowledges are irrelevant to the scope of Article III but nevertheless offers in a concededly gratuitous discussion. Pet. Br. 33–35.

Campbell-Ewald is wrong to assert that the absent class members "likely could do no worse than to be yoked to the binding class certification sought" by Mr. Gomez. Pet. Br. 34. If this Court allows Campbell-Ewald to moot the class action, then the best recovery that any absent class member can hope for is $1,503 *with no attorneys' fees*. *See* 47 U.S.C. § 227(b)(3). It is hard to imagine this payoff could exceed the costs of retaining an attorney, and no attorney will provide contingency-fee representation in a purely individual case for such a small recovery.

Campbell-Ewald suggests that absent class members might sue *pro se* in small-claims court. Pet. Br. 3. But there are many out-of-pocket and opportunity costs of small-claims litigation, including: tracking down the sender of the text message from an unidentified SMS number; paying filing fees; drafting and serving the complaint; traveling to the courthouse; and preparing for and attending the hearing and subsequent appeals. *See* Bruce Zucker & Monica Her, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 U.S.F. L. Rev. 315 (2003). All this for the *chance* of a $500 payoff—that *might* be trebled to $1,500 if one can prove an intentional violation.

Campbell-Ewald also holds the prerogative to remove to federal district court. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012). So no litigant could obtain the cost savings of small-claims court unless Campbell-Ewald agreed to litigate in that forum. Finally, TCPA plaintiffs must prove that the defendant used an "automatic telephone dialing system," which often requires expert testimony and analysis of the defendant's phone systems. *See Sherman v. Yahoo! Inc.*, 997 F. Supp. 2d 1129, 1135–36 (S.D. Cal. 2014). No plaintiff will incur those costs for the prospect of a $500 or $1,500 recovery.

Campbell-Ewald tries to show itself as the champion of absent class members by complaining that "the typical TCPA settlement offers absent class members a small fraction of the statutory damages they might recover . . . and saddles them with unnecessary attorneys' fees." Pet. Br. 34. But recovering "pennies on the dollar" *after* attorneys' fees is often preferable to a "full" recovery of $1,503 *before* paying the lawyer's bill and other costs of an individual lawsuit. That's why so many absent class members decline their opportunity to "opt out"; bringing an individual lawsuit isn't worth their time. Campbell-Ewald also neglects to mention that class members get to *choose* whether to allow Mr. Gomez to litigate on their behalf, or opt out and pursue their individual claims. *See* Fed. R. Civ. P. 23(c)(3)(B). Normally the law assumes that mentally competent adults act in their rational self-interest. *See* Richard A. Posner, *Economic Analysis of Law* 4 (9th ed. 2014). Yet Campbell-Ewald would have us believe that absent class members who decline to "opt out" from TCPA lawsuits are acting contrary to their

self-interest—and therefore should have their choice taken away by a revisionist "mootness" regime that would make it all but impossible to litigate TCPA lawsuits as class actions.

Even if Campbell-Ewald were right to assert that TCPA class actions hurt rather than help absent class members, the remedy is to amend Rule 23 or the Class Action Fairness Act or the TCPA—or require stricter judicial scrutiny of class-action settlements. It is not to issue a finding of "mootness" in a case that is transparently not moot.

III. CAMPBELL-EWALD IS NOT ENTITLED TO "DERIVATIVE SOVEREIGN IMMUNITY"

Campbell-Ewald correctly observes that the Navy cannot be sued under the TCPA, because there is no statute waiving sovereign immunity for TCPA lawsuits. Pet. Br. 2. But Campbell-Ewald further contends that the Navy's sovereign immunity should carry over to contractors acting on the Navy's behalf. Pet. Br. 3, 11–12, 35–50. Campbell-Ewald calls this "derivative sovereign immunity," and the idea goes something like this: If the government can't be sued for violating a federal law, then neither can those who violate that law while performing services for the government. Campbell-Ewald's claim of "derivative sovereign immunity" fails for two independent reasons.

First, there is no "derivative sovereign immunity" for government agents or contractors who violate federal

law.[14] Second, "derivative sovereign immunity" cannot extend to actions that violate the sovereign's specific instructions. *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 (1940), protects contractors only for acts that "execut[e] [Congress's] will," and Campbell-Ewald's alleged TCPA violations *contravened* the will of both Congress and the executive. *Id.* at 21.

A. Campbell-Ewald Cannot Claim "Derivative Sovereign Immunity" For Acts That Violate A Federal Statute

The jurisprudence of officer liability precludes "derivative" sovereign immunity for government agents who violate federal law. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949) ("In a suit against the officer to recover damages for the agent's personal actions, . . . [t]he judgment sought will not require action by the sovereign or disturb the sovereign's property. There is, therefore, no jurisdictional difficulty."); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 20 (1963) ("It early became clear that a suit against an officer was not forbidden simply because it raised a question as to the legality of his action as an agent of gov-

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[14] The parties dispute whether Campbell-Ewald's contract established an "agency" relationship with the Navy, and the lower courts did not resolve this question. Pet. App. 32a–34a. But Campbell-Ewald's immunity argument fails regardless of whether Campbell-Ewald acted as an "agent" or "independent contractor." One can assume an agency relationship, but we do not concede that point.

ernment . . . ."). Campbell-Ewald's theory of "derivative" sovereign immunity is incompatible with this doctrine and contradicts some of this Court's most canonical decisions.

The first obstacle to Campbell-Ewald's theory of "derivative sovereign immunity" is *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The federal government enjoys sovereign immunity for constitutional torts. *See FDIC v. Meyer*, 510 U.S. 471, 477–78 (1994) (Federal Tort Claims Act does not waive sovereign immunity for constitutional violations). Yet the government's sovereign immunity does not shield federal agents who violate constitutional rights while acting on the government's behalf. *See Bivens*, 403 U.S. at 390–91; *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72 (2001) (noting that federal prisoners in BOP facilities "may bring a *Bivens* claim against the offending individual officer," but "may not bring a *Bivens* claim against the officer's employer, the United States, or the BOP"); *United States v. Lee*, 106 U.S. 196 (1882). Indeed, this Court regards the government's sovereign immunity as something that *supports* an implied right of action against federal officers, because otherwise injured plaintiffs could be left without a remedy. *See Meyer*, 510 U.S. at 485 ("[W]e implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the Government was not available."); *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment) ("[T]he sovereign still remains immune to suit. For people in Bivens' shoes, it is damages or nothing."). That is antithetical to Campbell-

Ewald's belief that the government's sovereign immunity should *block* lawsuits against those who act on its behalf.

Of course, federal officers sued under *Bivens* may assert *qualified* immunity if they did not violate a clearly established right. *See Wood v. Moss*, 134 S. Ct. 2056 (2014). But the idea that they might assert "derivative sovereign immunity" based on their agency relationship with the government—an immunity that would shield them not only for reasonable mistakes but for *any* constitutional violation—is a non-starter in *Bivens* litigation. *See Malesko*, 534 U.S. at 70 ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.").

Campbell-Ewald does not acknowledge *Bivens* but seems to have crafted its argument to avoid direct conflict with that decision. It says, for example, that "government contractors" may assert derivative sovereign immunity when they violate federal law. Pet. Br. 37. But it remains conspicuously silent on whether government *officers* or *employees* may do so. If Campbell-Ewald hopes to avoid a clash with *Bivens* by limiting "derivative sovereign immunity" to contractors, then it must explain why a contractor should enjoy a more robust "derivative" immunity than a federal employee. Both have been "retained by the government to work on its behalf." Pet. Br. 35. And if anything, the employee should have a stronger claim to "derivative" immunity, because the employee has a closer relationship with the government. *See* 28 U.S.C. § 2671; *Logue v. United States*, 412 U.S. 521 (1973).

The second obstacle to Campbell-Ewald's "derivative sovereign immunity" theory is *Ex parte Young*, 209 U.S. 123 (1908). *Young* holds that a State cannot authorize its officials to violate federal law—and that any official who does so is stripped of the "sovereign immunity" that would otherwise attach to his office:

> [H]e is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

209 U.S. at 159–60. If state officers cannot violate federal law and retain their immunity from suit, then it is hard to see how federal contractors can violate federal law and assert "derivative sovereign immunity" from private lawsuits. One would think that the alleged violation of federal law would "strip" that immunity—at least if *Young*'s rationale is to remain good law.

The third obstacle to "derivative sovereign immunity" is the Westfall Act, which gives federal employees statutory immunity for state-law torts, but specifically withholds that immunity from employees who violate federal statutes. *See* 28 U.S.C. § 2679(b)(2)(B). Campbell-Ewald's theory of "derivative sovereign immunity" is incompatible with this statutory regime.

Campbell-Ewald never acknowledges the Westfall Act, yet it misleadingly claims that Naval officers would be "entitled to immunity from suit" if they had sent the text messages themselves. Pet. Br. 44. What Campbell-Ewald means to say is that Naval officers who violate the

TCPA might assert *qualified* immunity—an immunity that extends only to money damages—*if* they show that they did not violate clearly established rights. Pet. Br. 44 (citing only qualified-immunity cases to support its "immunity" claim for Naval officers). But Campbell-Ewald is not claiming qualified immunity, so it is a non-sequitur to rely on the theoretical possibility that Naval officers might assert qualified immunity for TCPA violations. Far more significant is that those Naval officers would *not* enjoy the "derivative sovereign immunity" that Campbell-Ewald is claiming in this case—an immunity that would shield them from *all* TCPA liability for acts taken on behalf of the Navy.

Campbell-Ewald's strategy throughout its brief is to invoke *qualified*-immunity arguments and cases to support its *absolute*-immunity defense—in the hope that this Court will follow its lead by treating all immunity defenses as fungible. That is untenable. Campbell-Ewald has never asserted qualified immunity in this case. It did not raise qualified immunity in its answer; the parties have taken no discovery on qualified-immunity issues; and Campbell-Ewald did not seek summary judgment on the ground that it committed a reasonable mistake of law. Campbell-Ewald sought immunity *solely* on the ground that the Navy's sovereign immunity should carry over to contractors who act on its behalf. *See* Mem. Supp. Def.'s Mot. Summ. J. at 8–10, ECF No. 116. *That* is the argument that the district court accepted, the court of appeals rejected, and this Court granted certiorari to resolve. Campbell-Ewald's efforts to smuggle qualified-immunity arguments into this case and obfuscate the dis-

tinction between qualified immunity and derivative sovereign immunity are demonstrably improper. *See* Sup. Ct. R. 14.1(a); *Day v. McDonough*, 547 U.S. 198, 217 (2006) ("Ordinary civil practice does not allow a forfeited affirmative defense whose underlying facts were not developed below to be raised for the first time on appeal.").[15]

The fourth and final obstacle to Campbell-Ewald's "derivative sovereign immunity" argument is the Constitution itself. Federal statutes such as the TCPA are the "supreme Law of the Land," and the executive must "take Care that the Laws be faithfully executed." U.S. Const. art. VI, cl. 2; *id.* art. II, § 3. The notion that the executive can instruct its contractors to violate an act of Congress and immunize them from liability is incompatible with legislative supremacy under the Constitution. The doctrine of sovereign immunity is designed to ensure Congress's control over the federal treasury, not to empower the executive and its delegates to flout congressional enactments. *See* U.S. Const. art. I, § 9, cl. 7. Does Campbell-Ewald think the CIA can authorize or instruct its contractors to torture detainees in foreign countries—while promising them "derivative sovereign immunity" if someone sues? *See* 18 U.S.C. § 2340A; 28 U.S.C. § 2680(k).

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[15] In addition, qualified immunity extends only to money damages; it cannot support summary judgment when Mr. Gomez is seeking both damages and injunctive relief. *See Morse v. Frederick*, 551 U.S. 393, 400 n.1 (2007).

Perhaps Campbell-Ewald will respond by saying that immunity can attach only when there has been a "constitutionally valid authorization," and that a directive to violate the anti-torture statute is never, under any circumstance, a "constitutionally valid" authorization. Pet. Br. 37. But that is equally true of *every* act of Congress that comports with the Constitution. *See* U.S. Const. art. VI, cl. 2; *id.* art. II, § 3. The executive can no more "authorize" its contractors to violate the TCPA than it can "authorize" them to violate RICO, the Foreign Corrupt Practices Act, the anti-torture statute, or the Constitution itself. At most, the executive can shield its agents from civil or criminal penalties by refusing to bring enforcement actions or issuing preemptive pardons. But the executive cannot instruct or invite its contractors to violate a constitutional federal statute, and a putative dispensation from the executive is no defense to a private right of action established by Congress.

So Campbell-Ewald loses either way. If the Navy had "authorized" Campbell-Ewald to violate the TCPA, then that flunks the "constitutionally valid authorization" test that Campbell-Ewald has propounded. Pet. Br. 37. And if the Navy didn't "authorize" violations of the TCPA, then Campbell-Ewald should be susceptible to liability—just like a government employee who violates a federal statute or constitutional provision within the scope of his employment. *See* 28 U.S.C. § 2679(b)(2); *Bivens*, 403 U.S. 388. Government contractors must obey all federal statutes that comport with the Constitution, regardless of whether they think they have permission from the executive to violate them.

None of this is to suggest that federal contractors can *never* claim immunity when they are sued for acts that arise out of their contract. For example, contractors might assert qualified immunity for reasonable mistakes of law. *See Filarsky v. Delia*, 132 S. Ct. 1657 (2012). But Campbell-Ewald is not claiming qualified immunity, and it waived that defense by not raising it in its answer or at summary judgment.[16] *Filarsky* offers no support for the idea that government agents, employees, or contractors might claim a "derivative sovereign immunity" that extends beyond reasonable mistakes of law. Campbell-Ewald does not even acknowledge that *Filarsky* was a qualified-immunity case until page 48 of its brief, and then only in a parenthetical. Yet it repeatedly cites *Filarsky* as if it had conferred an absolute immunity akin to the "derivative sovereign immunity" that Campbell-Ewald asserts in this case. Pet. Br. 36–39.

Federal contractors might also assert a preemption defense if their contract specifically requires something that state law proscribes. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988) (preempting state-law design-defect claims against federal contractors when "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were

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[16] It is also far from clear that Campbell-Ewald, as a "private company subject to competitive market pressures," would even be entitled to assert qualified immunity. *Richardson v. McKnight*, 521 U.S. 399, 409 (1997).

known to the supplier but not to the United States."). But *Boyle*'s preemption defense is unavailable to contractors who violate *federal* statutes. And the executive cannot authorize its agents to violate a constitutional congressional enactment. *See* U.S. Const. art. II, § 3; *id.* art. VI, cl. 2. No federal contract can ever "preempt" a private right of action established by Congress. *Cf. POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236–38 (2014) (holding that a statutory right of action created by Congress may be barred by executive agency action only when Congress has enacted legislation evincing an intent to preclude the action in those circumstances).

Finally, *Yearsley* holds that contractors may escape liability for actions that "execut[e] [Congress's] will." 309 U.S. at 21. In disallowing a lawsuit brought against a government contractor who had built a dike that eroded the plaintiff's land, *Yearsley* emphasized that the dike had been authorized by an act of Congress. *Id.* at 20 ("[T]he work thus authorized and directed by the governmental officers was performed pursuant to the Act of Congress of January 21, 1927, 44 Stat. 1010, 1013."). Then the Court declared:

> [I]f this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will.

Id. at 20–21. To the extent that a contractor's actions are congressionally authorized, then state law must give way, and any "takings" caused by congressionally authorized projects must be litigated against the federal govern-

ment in the Court of Federal Claims. *Id.* at 21–22; *E. Enters. v. Apfel*, 524 U.S. 498, 520 (1998) ("[A] claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." (citation omitted)).

Like Campbell-Ewald, we doubt that *Yearsley*'s holding can be limited to "public works projects," as the court of appeals suggested. Pet. App. 15a. *Yearsley* focused on the fact that the contractor was "executing [Congress's] will," and those situations may extend beyond public works. But *Yearsley* cannot support "derivative sovereign immunity" for a contractor who violates an act of Congress. Such a contractor is violating rather than executing Congress's will—and falls outside the protection of *Yearsley* for that reason alone. For Campbell-Ewald to invoke *Yearsley*, it would have to point to a congressional enactment that both authorized Campbell-Ewald's advertising campaign *and* implicitly repealed the restrictions in the TCPA. Campbell-Ewald does not attempt to make that showing.

Yearsley did not establish or recognize the idea of "derivative sovereign immunity"—a phrase that appears nowhere in *Yearsley* or in any opinion of this Court. The lower-court decisions that confer "derivative sovereign immunity" are using a misnomer that this Court should repudiate. The government's sovereign immunity does not extend to employees, agents, or contractors who act on its behalf. Government-contractor defenses should be analyzed as preemption questions, in which the contractor must rely on the preemptive force

of congressional authorization (*Yearsley*) or a specific contractual obligation to the executive (*Boyle*).

B. Campbell-Ewald Cannot Claim "Derivative Sovereign Immunity" For Acts That Violate The Navy's Specific Instructions

Even if this Court were inclined to create a new doctrine of "derivative sovereign immunity" for federal contractors (but not employees?) who violate federal law, that immunity would not help Campbell-Ewald because the Navy did not authorize anyone to violate the TCPA. Campbell-Ewald's contract with the Navy required compliance "with all applicable Federal laws." J.A. 220. And the Navy specifically directed Campbell-Ewald to send text messages only to those who had "opted in" to receive them. J.A. 42.

Campbell-Ewald repeatedly claims that the Navy "approved Campbell-Ewald's work." Pet. Br. 1, 3; *see also id.* at 5 ("approved" Campbell-Ewald's "plan"); *id.* at 12 ("[T]he text message campaign targeted by Plaintiff was developed by Campbell-Ewald . . . and was specifically approved by Naval officers."). Those statements are (at best) imprecise. The Navy approved the *content* of the text message. J.A. 40–41, 72. But the Navy never approved—indeed, it expressly *disapproved*—the sending of text messages to nonconsenting recipients. According to Lee Buchschacher, the Navy's Rule 30(b)(6) witness:

> It was our policy that any list procured by Campbell-Ewald had to be people that had opted in in some way to receive information

> about money for college, career opportunities, travel or adventure or some sale of the Navy. . . . [I]f these people haven't opted in, then you know, we would be in trouble not only nationally but also locally. So it was our request that any list that they got would be opted in.

J.A. 42–43; *see also* J.A. 44 ("Q. . . . Campbell-Ewald was not authorized that you know of to send text messages to individuals who had not opted in? A. No, they were not."). Buchschacher also testified that he would not have approved Campbell-Ewald's plan had he known that it would result in violations of the TCPA. J.A. 45. Finally, the "plan" that the Navy "approved" specified that the text messages would be delivered "to the cell phones of 150,000 adults 18 to 24 *from an opt-in list* of over 3 million." J.A. 41–42 (emphasis added). So the Navy's "approval" of Campbell-Ewald's "plan" was based on the understanding that the text messages would be sent only to recipients on that opt-in list. *See* J.A. 43 ("It was my understanding this was a kosher list.").

"Derivative sovereign immunity" cannot shield actions that violate the government's specific instructions. Even in *Boyle*, which allowed a government contractor to escape liability under state law, this Court was careful to limit its holding to situations in which "(1) the United States approved reasonably precise specifications" and "(2) the equipment conformed to those specifications." *Boyle*, 487 U.S. at 512; *see also Yearsley*, 309 U.S. at 21 ("[T]here is no liability on the part of the contractor for executing [Congress's] will."). Neither *Boyle* nor *Yearsley* even remotely supports the idea of contractor im-

munity for actions that contradict the government's explicit directions. And Campbell-Ewald cites no case from any court that has conferred immunity in that situation.

Indeed, Campbell-Ewald seems determined to sweep this problem under the rug. Its brief never so much as mentions the contractual provision requiring compliance with "all applicable Federal . . . laws." J.A. 220. Nor does it acknowledge that the Navy specifically instructed it to send text messages only to those who had "opted in" to receive them. J.A. 42–45. Instead, Campbell-Ewald points the finger at MindMatics and tries to disclaim responsibility for the botched text-messaging campaign. Pet. Br. 46–47. That has nothing to do with whether Campbell-Ewald can claim "derivative sovereign immunity" for its alleged violations of the TCPA.

Derivative sovereign immunity is an affirmative defense; it is not concerned with whether Campbell-Ewald actually violated the TCPA. *See* 5 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1270 (3d ed. 1998). In ruling on this affirmative defense, a court must *assume* that Campbell-Ewald violated the TCPA, and ask whether that assumed violation can be excused on the ground that the Navy authorized or commanded it. One does not establish an affirmative defense by saying "I didn't do it" or "You sued the wrong defendant." Those are denials, not affirmative defenses, and they are outside the question presented. So even if Campbell-Ewald could *prove* that it bears no responsibility for MindMatics's actions, that would do

nothing to advance its affirmative defense of derivative sovereign immunity.[17]

Campbell-Ewald says that "a vicarious liability theory cannot deprive Campbell-Ewald of derivative sovereign immunity." Pet. Br. 46. That begs the question by assuming that Campbell-Ewald is entitled to immunity to begin with. The illegal action for which Campbell-Ewald has been sued—sending a text message to a nonconsenting recipient—was not authorized by the Navy and indeed was specifically forbidden by the Navy. *No* entity can claim "derivative sovereign immunity" for this alleged violation of the TCPA. The TCPA's vicarious-liability regime does not override Campbell-Ewald's claim to immunity; there simply is no immunity to override.

Finally, Campbell-Ewald makes the astounding claim that contractors can assert immunity for acts that *violate* their contract with the government—so long as the contractor is acting within the "general scope" of its contract. Pet. Br. 47. On this view, a military contractor retained to interrogate wartime enemy combatants would enjoy "derivative sovereign immunity" for acts of torture committed during those interrogations—even if its contract with the government *specifically prohibited* tor-

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[17] In all events, Campbell-Ewald's brief never denies that the TCPA incorporates vicarious liability or that MindMatics was acting as its agent. And even if it did those issues would fall outside the questions presented. The court of appeals held that the TCPA incorporates vicarious liability and Campbell-Ewald did not seek certiorari on that question. Pet. App. 10a–14a.

ture. Campbell-Ewald makes no effort to explain how acts that violate the government's instructions can be "actions taken on the government's behalf." Pet. Br. 37. Nor does it explain how a contractor that breaches its contractual obligations to the government can be "executing [Congress's] will." *Yearsley*, 309 U.S. at 21. And at what point does a breach of contract become sufficiently grave as to take the contractor outside the "general scope" of the contractual relationship? Campbell-Ewald offers no guidance on that question, only a conclusory assertion that it acted within the "general scope" of its contract (whatever that means).[18]

C. Campbell-Ewald's Policy Arguments Are Without Merit

As with mootness, Campbell-Ewald tries to buttress its claim for immunity with policy considerations. Pet. Br. 48–50. None of this compensates for the absence of legal

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[18] Campbell-Ewald mischaracterizes the Solicitor General's position in *KBR, Inc., v. Metzgar*, 135 S. Ct. 1153 (2015) (denial of petition for writ of certiorari). The Solicitor General did not say that contractors "generally" should enjoy immunity when acting "within the general scope of the contractual relationship." Pet. Br. 47. The Solicitor General was making a *preemption* argument based on federal common law, limited to cases that "arise[] out of the combatant activities of the military." Brief for the United States as Amicus Curiae at 15, *KBR*, 133 S. Ct. 1523 (2013) (No. 13-1241) (emphasis omitted) (quoting 28 U.S.C. § 2680(j)). The Solicitor General did not endorse immunity for violations of federal law. Nor did he suggest that his preemption argument would apply to any contractor outside the military-combatant setting.

authority, but even if it could the arguments are unconvincing.

First, Campbell-Ewald never explains why qualified immunity is insufficient to induce contractors to take on projects for the government. Qualified immunity is enough to recruit federal employees. And although the government may agree to indemnify its employees for liabilities they incur, a contractor has the same ability to insist on an indemnification clause in its contract. No one thinks that the government's need to indemnify its employees defeats the doctrine of sovereign immunity or hinders the government's ability to hire competent people. So it is not apparent why government contractors should be subject to a different regime.

Second, Campbell-Ewald's theory of immunity would remove the competitive advantage for firms that can ensure compliance with the law and their contractual promises. Law-abiding firms, and firms that have installed precautions to prevent legal violations, have less reason to fear liability and can offer more attractive bids than firms that are prone to blundering. It is hard to see why this Court should adopt an immunity doctrine that puts negligent and law-abiding firms on an even playing field.

IV. CAMPBELL-EWALD'S ATTACKS ON CLASS-ACTION LAWYERS AND THE TCPA HAVE NO BEARING ON THE ISSUES BEFORE THIS COURT

Campbell-Ewald's brief is permeated with ad hominem attacks on Mr. Gomez and the class-action bar. *See* Pet. Br. 2 (suggesting that Mr. Gomez should have "brush[ed] off" the illegal text message rather than seek

recovery); *id.* at 4 ("[M]ore often than not the winners are the class action lawyers instead of the recipients of unwanted messages."); *id.* at 34–35 & n.8. Campbell-Ewald also complains loudly about the "mushroom[ing]" scope of liability under the TCPA. *Id.* at 3–4.

There are only two issues before this Court: mootness and immunity. Neither has anything to do with the merits of Mr. Gomez's claims or the scope of liability under the TCPA. And neither has anything to do with the different (and important) issue of whether class-action settlements too often benefit attorneys at the expense of absent class members. *That* is a subject for courts to address by applying the standards for class certification or scrutinizing class-action settlements under Rule 23—not by inventing new mootness or immunity doctrines that will extend far beyond class actions brought under the TCPA. *See* Brief of Amicus Nat'l Right to Work Legal Def. Found., Inc. Campbell-Ewald's efforts to sway this Court by attacking class-action lawyers and the TCPA are sophistry, and they do nothing to conceal the demonstrable shortcomings of its mootness and immunity arguments.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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CAMPBELL-EWALD COMPANY,
Petitioner,

v.

JOSE GOMEZ,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ARGUMENT

I. THIS CASE IS MOOT

When all is said and done, even Plaintiff and the United States admit that a case must come to an end when further litigation is pointless. Resp. Br. 32; U.S. Br. 8. They say the test is whether a plaintiff's refusal to accept an offer of capitulation is based on "obstinacy or vindictiveness." *Id.* But Article III jurisdiction does not turn on a plaintiff's subjective intent in refusing an offer; it turns on whether a plaintiff retains a *personal stake* in the outcome of the litigation. Here, that determination turns on an objective inquiry into whether the defendant's offer is for complete relief, *i.e.*, everything the plaintiff could secure through a judgment in his favor. Plaintiff says he cannot be "forced" to accept full relief. But the real question is whether a plaintiff can force *a court* to adjudicate a case—and expound on the law in doing so—when the defendant has already capitulated. Article III answers that question with an emphatic no. Courts have "no business" adjudicating such a case. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

As the case reaches this Court, it is established that Campbell-Ewald's offer was for complete relief. The district court so found (Pet. App. 40a), and the Ninth Circuit decided the case based on that premise (*id.* at 5a). Based on *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), Plaintiff and the government argue that a plaintiff's potential interest—before any class is certified—in the financial benefits of class litigation is sufficient to keep a case alive. But *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532 (2013), expressly limited *Roper* to its facts, *i.e.*, appeals from the denial of class certification. Plaintiff

and the government are asking the Court to extend *Roper* well beyond its facts, and to recognize a new, substantive right to class litigation that arises as soon as a complaint is filed. There is no basis for creating that right, and the Rules Enabling Act prevents it.

The only remaining question is how to dispose of the case. The Court should remand with instructions to dismiss the case as moot, as it would do if a case settled. That would not leave Plaintiff "empty handed." Resp. Br. 10. If a defendant withdraws its tender after dismissal, a plaintiff can reinitiate litigation based on a change in circumstances negating mootness. *Infra* at 10. Alternatively, the Court should direct the district court to enter a judgment for plaintiff based on the terms of the offer. Mootness divests a court of power to adjudicate a case *on the merits*, but not from taking non-merits-based steps to dispose of a case in a manner "consonant to justice." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) (citation omitted). Such a judgment unquestionably would satisfy, and thus moot, the claim.

A. Plaintiff's Position Contravenes Basic Article III Principles

1. As Campbell-Ewald has explained (Pet. Br. 13-16), Article III limits the jurisdiction of the federal courts to cases that present "an actual controversy, and adverse interests," *Lord v. Veazie*, 49 U.S. (8 How.) 251, 255 (1850), maintained by a plaintiff who, at all times, "possesses a legally cognizable interest, or 'personal stake' in the outcome of the action," *Genesis Healthcare*, 133 S. Ct. at 1528 (citations omitted). Plaintiff ignores the "personal stake" requirement and, astoundingly, argues that Article III imposes no adversity requirement. Resp. Br. 10-11, 19-23.

But this Court's cases make clear that a plaintiff must show that he has a "personal stake" in the outcome of the action at all times (Pet. Br. 14-15), and adversity has been recognized as a fundamental requirement of Article III since the founding. *See, e.g.*, *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937); *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892). The exceptional cases cited by Plaintiff (at 21-22) do not override that requirement, or excuse the lack of adversity as a matter of "common practice in ordinary cases." *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013). In each of these cases, individual plaintiffs, who petitioned the government to "assert, register, or claim a legal interest under federal law," retained a concrete, personal stake in the outcome of the case. James E. Pfander & Daniel D. Birk, *Article III Judicial Power; the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 Yale L.J. 1346, 1355 (2015). A plaintiff who has been handed everything he could obtain through a favorable judgment no longer has such a personal stake.

2. Plaintiff says (at 23) there is "[n]o [a]uthority" supporting Campbell-Ewald's position. But whereas Plaintiff relies almost exclusively on the *dissent* in *Genesis Healthcare*, Campbell-Ewald has pointed to several cases, including *California v. San Pablo & Tulare Railroad Co.*, 149 U.S. 308 (1893), showing that the tender of complete relief moots a case—regardless of whether it is accepted. Pet. Br. 16-19. Plaintiff tries (at 11, 24-26) to dismiss *San Pablo* as old or irrelevant. But *San Pablo* is clearly valid precedent (*cf. id.* at 26 n.6) and it unmistakably speaks to the "power," *i.e.*, jurisdiction, of the courts. 149 U.S. at 314 (court is "not

empowered to decide moot questions"); *see id.* (refusing to "enlarge the power" of the court).

Nor is this precedent an aberration. It is consistent with a long line of English authorities holding that "it is the bounden duty of this Court to put a stop to any further proceedings" once a defendant offers to fully satisfy a claim, even if the defendant's offer "was not accepted." *Holden v. Kynaston*, 2 Beav. 204, 206, 205, 48 Eng. Rep. 1158, 1159, 1158 (1840); *see also, e.g.*, *Damer v. Earl of Portarlington*, 2 PH 30, 35, 41 Eng. Rep. 852, 854 (1846) ("Upon the general principle, there can be no doubt, that where a suit is instituted, and the Defendant comes and tenders all that the Plaintiff asks, there is jurisdiction in the Court to prevent the Plaintiff from going on."); *Field v. Robinson*, 7 Beav. 66, 67, 49 Eng. Rep. 987, 988 (1844) (same).

Plaintiff's "acceptance" theory is also at odds with modern Article III precedents, including *Clapper v. Amnesty International USA*, 133 S. Ct. 1138, 1151 (2013), in which the Court stressed that parties cannot "manufacture" Article III jurisdiction "merely by inflicting harm on themselves." *See* Pet. Br. 22-23. Yet that is the essence of Plaintiff's theory—a plaintiff can manufacture jurisdiction simply by refusing to accept everything that he could secure through a judgment, the judicial equivalent of a hunger strike.

Likewise, under the "voluntary cessation" doctrine, a defendant's unilateral decision to cease the challenged conduct moots a claim for *prospective* relief if it is clear that the defendant will not engage in the conduct again, regardless of whether the plaintiff consents to the defendant's actions or agrees that they moot his claim. *See, e.g.*, *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013). It follows that a defendant's

unilateral act (the offer) moots a claim for *retrospective* relief if it is clear that the offer is for complete relief. In both situations, a court must determine if the defendant's unilateral act gives the plaintiff all the relief he could secure from a favorable judgment. And in both, the case is moot if the answer is yes.

Plaintiff points (at 19) to a criminal defendant's guilty plea. But while a guilty plea may certainly moot particular issues (such as a pre-trial ruling or the guilt/innocence determination), the criminal context is fundamentally different. Among other things, the government retains a concrete interest in the case until a conviction has been entered and the sentence served. And of course, the government cannot force a court to conduct a trial on the merits once a plea is entered. Presumably this all explains why the United States itself has not embraced this analogy.

3. Falling back, Plaintiff argues (at 12, 32-33) that Campbell-Ewald's offer was not for complete relief. This argument asks the Court to overturn a finding made by the district court, Pet. App. 40a, and relied upon by the Ninth Circuit, *id.* at 5a. *See United States v. Ceccolini*, 435 U.S. 268, 273 (1978) (discussing the "traditional deference to the 'two court rule'" (citation omitted)). Moreover, the Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied upon below." *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988). In any event, this argument fails.

In opposing certiorari, the only reason Plaintiff gave in claiming that the offer was not for "full relief" (as the question presented stated) was that it did not provide for attorney's fees. Opp. 23. But a plaintiff is not entitled to attorney's fees unless Congress

authorizes them, *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994), which the TCPA does not. Because Plaintiff has no right to recover attorney's fees if he wins, the absence of such fees does not make the offer for anything less than complete relief.

Plaintiff's new arguments (at 32-33) that Campbell-Ewald's offer was not for complete relief are waived. Sup. Ct. R. 15.2. In any event, as the government's own question presented recognizes (at I), Campbell-Ewald offered Plaintiff an amount "greater than the maximum damages that [he] could have obtained by litigating th[e] individual claim to judgment."

4. The government's focus (at 13) on the mechanics of Rule 68 is misplaced. Campbell-Ewald made a separate tender that remains outstanding (which, to be clear, did *not* expire by its terms, *cf.* U.S. Br. 5). Pet. App. 57a-59a. In any event, Rule 68 was not designed for the situation in which a defendant makes an offer of *complete* relief. *Cf. Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981) (Rule 68 applies where "amount of recovery is uncertain"). At that point, Article III, not Rule 68, controls. Fed. R. Civ. P. 82.

B. An Interest In The Potential Benefits Of Class Litigation Is Insufficient

Plaintiff appears to have abandoned the "inherently transitory" and "relation-back" rationale relied on by the Ninth Circuit. Pet. Br. 29-30. Instead, Plaintiff (at 36-43) and the government (at 20-22) argue that a potential interest in the "cost-sharing" benefits of class litigation—before any class is certified—is sufficient to keep a case alive. Plaintiff did not make this argument in his opposition brief or the Ninth Circuit, so it is waived. In any event, this new argument fails.

1. This cost-sharing argument is grounded on *Roper*. But *Roper* involved only whether a plaintiff could appeal a ruling denying class certification—an issue that was "collateral to the merits of a litigation." 445 U.S. at 336. In answering that question. the Court held that a court "had jurisdiction to entertain the appeal only to review the asserted procedural error, not for the purpose of passing on the merits of the substantive controversy." *Id.*; *accord United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980). Here, there is no class-certification ruling, and Plaintiff is arguing that the case is live for *all* purposes, including "the merits of the substantive controversy."

Moreover, *Genesis Healthcare* explicitly limited *Roper* to its "particular circumstances." 133 S. Ct. at 1532. Because *Roper* was "distinguishable on the facts," the Court had no need to reconsider the "continuing validity" of *Roper*'s view that the potential benefits of class certification justified an appeal from a ruling denying certification. *Id.* at 1532 n.5. Because *Roper* is likewise distinguishable here, there is again no need "to overrule *Roper*" (Resp. Br. 38). But Plaintiff and the government do not seek an application of *Roper*; they seek a vast *extension* of it to create a right to class litigation as soon as a complaint is filed. That would fly in the face of *Genesis Healthcare*.

Not to mention *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990). In *Lewis*, the Court held that an "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Id.* at 480. Likewise, the Court has repeatedly confirmed that "an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for

Article III standing purposes." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000); *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). The government used to recognize the force of *Lewis*, but here it attempts an unacknowledged, below-the-margin flip on *Lewis*'s direct bearing on this issue. *Compare* U.S. Brief 27 n.4, *Genesis Healthcare*, 133 S. Ct. 1523 (2013) (No. 11-1059), 2012 WL 4960359, *with* U.S. Br. 22 n.7.[1]

Plaintiff's argument (at 33) that a mere demand of "class-wide relief" can keep a case alive also fails. If that were enough, then *Roper* would have been decided on that broader ground. In any event, because a class lacks any separate "legal status" before certification, there is no cognizable interest in class relief before certification. *Sosna v. Iowa*, 419 U.S. 393, 399 (1975); *see Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 430 (1976); *Board of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129-30 (1975). As Judge Friendly put it, "we know of no principle that a plaintiff must be allowed to pursue litigation in which he no longer has an interest merely because this could benefit others." *Abrams v. Interco, Inc.*, 719 F.2d 23, 33 n.9 (2d Cir. 1983).

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[1] Plaintiff's "incentive award" argument (at 35) likewise fails. At best, this is just a "byproduct of the suit" too. *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 874-75 (7th Cir. 2012), the lone case Plaintiff cites, is distinguishable because the plaintiffs there (unlike Plaintiff here) pointed to a specific "provision of [a] settlement agreement," and the court held only that this interest was sufficient to permit an appeal of the denial of class certification. In any event, this argument is new, and thus waived.

2. Plaintiff's and amici's objections to Campbell-Ewald's position boil down to policy arguments that not only are better reserved for Congress but overlook that Congress actually intended that TCPA claims would be brought on an individual basis (Pet. Br. 3-4). These arguments lose considerable steam when Plaintiff acknowledges (at 42) that what is really at stake in this kind of case is "'pennies on the dollar'" for the unnamed individuals who allegedly received unsolicited recruiting text messages. In any event, such policy arguments cannot override Article III's fundamental limits. Nor can they transform Rule 23's procedural rule into a font of substantive rights.

And, in the end, respecting Article III's limits will not spell the end of class actions. In many, if not most cases, an offer of complete relief will be infeasible because the defendant is unwilling to pay, damages are uncertain, or there are too many others lining up for relief. By contrast, allowing a plaintiff with a moot claim to proceed on behalf of a putative class serves only the interests of attorneys seeking a windfall in fees by leveraging the threat of certification into a lucrative settlement. One can see the allure of that approach from the class action bar's perspective. But Article III demands the existence of an actual "case or controversy," not the possibility of a pot of gold.[2]

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[2] Plaintiff's suggestion (at 38 n.12) that Campbell-Ewald somehow "induced" experienced counsel to delay a class-certification motion is false. Pet. CA9 Reply in Supp. of Mot. to Dismiss 7-8, ECF No. 16-1.

C. This Case Should Come To An End

1. Once a court determines that a defendant has tendered full relief, the court should dismiss the case as moot, just as a court would do after finding that a case settled. Pet. Br. 19-22. Remarkably, Plaintiff asks (at 31 n.9) the Court to "clarify" (*i.e.*, rewrite) its many decisions recognizing that settlement moots a case and thus triggers dismissal. But instead of unsettling this caselaw and common practice, the Court should *follow* this example and hold that dismissal is required here.

That result will not leave plaintiffs "empty-handed." Resp. Br. 10. If there is a change in circumstances negating the reasons for finding mootness, a plaintiff can reinitiate litigation. *See, e.g., Mills v. Richardson*, 464 F.2d 995, 1000 (2d Cir. 1972) (Friendly, J.) (case dismissed as moot based on government's representation that it would pay benefits at issue was "no longer moot" after government notified plaintiff that it would seek recoupment of such benefits); *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 832 F.2d 245, 246 (2d Cir. 1987) (similar).

2. At a minimum, the district court should dispose of the case by entering judgment for Plaintiff according to the terms of the offer, as the Sixth Circuit has instructed. Pet. Br. 10, 21. And that alternative argument is neither a "concession" (Resp. Br. 14) that the case is *not* moot nor a "self-contradict[ion]" (U.S. Br. 7-8) in light of the fact that it *is* moot.[3]

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[3] Nor is this argument waived. U.S. Br. 15. Campbell-Ewald raised it in its certiorari petition (at 14 n.3, 17; *see* Cert. Reply 7), Plaintiff has never argued waiver, and it is fairly included in the first question presented. *See* U.S. Br.

Mootness deprives a court of the power to adjudicate the case on the merits, *i.e.*, "to decide" the case. *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983). But mootness does not render a court powerless to take non-merits steps to dispose of the case "consonant to justice." *U.S. Bancorp Mortg. Co.*, 513 U.S. at 24 (citation omitted); *see Sinochem Int'l. Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) ("[J]urisdiction is vital only if the court proposes to issue a judgment on the merits." (citation omitted)). There is no basis for limiting this principle to appellate courts, who have no more Article III power than district courts. *Cf.* Resp. Br. 15-16.[4]

Entry of judgment for plaintiff in accordance with a defendant's offer of full relief simply recognizes the circumstances by which it became moot. This approach is not novel. Pet. Br. 21. And it accords with how courts have commonly dealt with the analogous situation of settlements and consent decrees. *See, e.g.*, *Gould v. Control Laser Corp.*, 866 F.2d 1391, 1392 (Fed. Cir. 1989) ("Settlement moots an action, although jurisdiction remains with the district court to enter a consent judgment." (citations omitted)). Like a consent decree, a judgment in accordance with the terms of an offer of complete relief is "enforceable as[] a judicial decree . . . subject to the rules generally applicable to

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18 n.6 (acknowledging that courts have discussed the "entry of judgment" argument in "moot[ness]" terms).

[4] Rule 12(h)(3) does not prevent a court from taking non-merits steps to dispose of a case. *Cf.* Resp. Br. 18. Indeed, Rule 58 calls for entry of a separate judgment in all cases, even if it just executes a dismissal. Fed. R. Civ. P. 58(a).

other judgments and decrees." *Rufo v. Inmates of the Suffolk Cty. Jail*, 502 U.S. 367, 378 (1992); *see also Pope v. United States*, 323 U.S. 1, 12 (1944).

Regardless of the precise moment that mootness occurs once a defendant has made an offer of complete relief, the entry of such a judgment unquestionably "satisf[ies]," and thus "moot[s]," the plaintiff's claim. *Genesis Healthcare*, 133 S. Ct. at 1529 n.4.

II. CAMPBELL-EWALD IS ENTITLED TO IMMUNITY

Neither Plaintiff nor the government tries to defend the Ninth Circuit's rule that the immunity recognized by *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), is confined to "public works projects." Pet. App. 15a. Nor do they seriously dispute that "[government] contractors might assert qualified immunity for reasonable mistakes." Resp. Br. 51; *see* U.S. Br. 27 n.9. Instead, they respond that *derivative* immunity can only mean *absolute* immunity. But that is incorrect. As courts have recognized, "*Yearsley* immunity" is a form of "qualified immunity" for those acting within the scope of a government contract. *Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 647 (6th Cir. 2015). And neither Plaintiff nor the government provides any reason to deny Campbell-Ewald immunity for what boils down to a mistake by a sub-contractor hired with the Navy's approval to execute a recruiting campaign explicitly authorized and closely supervised by the Navy. Pet. App. 33a.

A. All Agree The Ninth Circuit Erred

As the government acknowledges, the Ninth Circuit based its immunity ruling on its view that *Yearsley* is "'not applicable'" to this case because

Yearsley is limited to "'public works projects.'" U.S. Br. 7 (quoting Pet. App. 15a); *see* Pet. Br. 41-43. Neither Plaintiff nor the government defends that arbitrary limit. This error alone warrants reversal.

B. Contractors, Just Like Individuals, Enjoy Immunity For Acts Within The Scope Of Their Duties

Neither Plaintiff nor the government offers a sound reason for denying contractors like Campbell-Ewald immunity for carrying out the government's work.

1. Plaintiff and the government base their opposition on the premise that derivative immunity is "absolute" (Resp. Br. 13, 48-51) or "categorical" (U.S. Br. 30, 31 n.12). Not true. As courts have recognized, derivative immunity is qualified. *See, e.g.*, *Adkisson*, 790 F.3d at 647 ("*Yearsley* immunity is, in our opinion, closer in nature to qualified immunity for private individuals under government contract ."); *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 221 (4th Cir. 2012) (en banc) (categorizing derivative sovereign immunity among "immunities that are not absolute"); *In re KBR, Inc.*, 925 F. Supp. 2d 752, 757 (D. Md. 2013) ("derivative sovereign immunity is a qualified immunity"), *vacated on other grounds sub nom. Metzgar v .KBR, Inc. (In re KBR, Inc.)*, 744 F.3d 326 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1153 (2015).[5]

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[5] Plaintiff's attempt to argue that Campbell-Ewald has waived any claim to less-than-absolute immunity should be rejected. As Plaintiff acknowledges, "throughout its brief" Campbell-Ewald "invoke[s] *qualified*-immunity arguments." Resp. Br. 48. Campbell-Ewald did so as well in its certiorari petition (Pet. 25-26) and in the Ninth Circuit. *See, e.g.*, Pet.

Derivative immunity protects contractors for actions taken on the government's behalf, and under its supervision, within the scope of their contracts. Pet. Br. 37-38; KBR Amicus Br. 27-31. That is consistent with qualified-immunity principles. *See, e.g., Simons v. Bellinger*, 643 F.2d 774, 777 (D.C. Cir. 1980) (government "officers . . . are only entitled to qualified immunity for acts performed within the scope of their authority"). The official, or contractor, "acts beyond the scope of his authority only if the injury occurred during the performance of an act clearly established to be outside of the limits of that authority." *Better Gov't Bureau, Inc. v. McGraw (In re Allen)*, 106 F.3d 582, 594 (4th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998).

Yearsley simply recognized what should be an uncontroversial principle after *Filarsky v. Delia*, 132 S. Ct. 1657 (2012)—private contractors who "perform the same functions as government employees . should receive immunity from suit when they perform these functions." *Metzgar v. KBR, Inc.* (*In re KBR, Inc.*), 744 F.3d 326, 344 (4th Cir. 2014) (citing *Yearsley* and *Filarsky*), *cert. denied*, 135 S. Ct. 1153 (2015). That is also consistent with *Boyle* preemption. *Cf.* Resp. Br. 51-52; U.S. Br. 30. Here, as in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 505 (1988), protection is not categorical but instead turns on a case-specific inquiry into whether the contractor's actions were

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CA9 Br. 26-27, ECF No. 29 (relying on *Filarsky v. Delia*, 132 S. Ct. 1657 (2012)). And the Ninth Circuit recognized Campbell-Ewald's reliance on *Filarsky* and addressed the argument. Pet. App. 18a-19a; *cf.* U.S. Br. 27 n.9.

within the scope of the contract. It is therefore not surprising that *Boyle* cites *Yearsley*. *Id.* at 506.[6]

This does not mean that all immunity defenses are "fungible." Resp. Br. 48. But certainly they are shaped by similar guiding principles and overlap in important respects. Pet. Br. 38-41. What has become known as "derivative sovereign immunity" adapts those principles to government contractors.

2. Plaintiff also emphasizes that "government agents or contractors" cannot be authorized to "violate federal law," suggesting that this case is about sanctioning rogue entities to engage in "torture." Resp. Br. 43-44; *see id.* at 43-54. That is plainly wrong.

Immunity protects even government officials that violate the Constitution, let alone statutes regulating text messaging. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); Pet. Br. 37. That is not because such officials have "permission" (Resp. Br. 50) to violate federal law, but because immunity protects reasonable mistakes by those acting within the scope of their authority. Thus, in determining "whether a police officer may assert qualified immunity against a Fourth Amendment claim, [courts] do not ask whether he has the right to engage in unconstitutional searches and seizures, but whether engaging in searches and

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[6] The immunity recognized by *Yearsley* is not tied solely to the government's. In *Yearsley* itself the government did not enjoy immunity from the underlying takings claim. And *Yearsley* relied in part on *The Paquete Habana*, which held that, "when the act of a public officer is authorized or has been adopted by the sovereign power, *whatever the immunities of the sovereign*, the agent thereafter cannot be pursued." 189 U.S. 453, 465 (1903) (emphasis added).

seizures in general is a part of his job-related powers and responsibilities." *Holloman v. Harland*, 370 F.3d 1252, 1266 (11th Cir. 2004). Similarly, immunity does not turn on a *post hoc* inquiry into whether the illegal act was explicitly sanctioned. *Cf.* Resp. Br. 55.

Immunity would be essentially meaningless—for government employees as well as agents or contractors—if it only existed when the government ex ante (or ex post) explicitly authorizes the violation of law. But that is not the inquiry. *See Barr v. Matteo*, 360 U.S. 564, 572 (1959) ("What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him"; otherwise, it would "defeat[] the whole doctrine" (quoting *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) (Hand, J.)). Rather, it is settled that government employees and agents *do* enjoy immunity as long as they do not violate clearly established rights in acting within the scope of their duties. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

There is no reason why contractors acting on behalf of the government should not enjoy that protection. That is true even though their contracts invariably include boiler-plate language saying that they shall comply with federal law. JA 220. Government employees agree to comply with federal law as well. But that does not mean they are deprived of immunity when their missteps happen to result in the violation of federal law. Had Naval officers themselves executed the recruitment campaign, there is no question that they would be entitled to immunity if a wrong number ended up on an opt-in list of hundreds of thousands of

recipients—even if that mistake resulted in a violation of federal law. A contractor hired by the Navy to undertake the same campaign, under the Navy's direct supervision, enjoys no less protection.[7]

3. The government acknowledges that its employees can act with confidence that their mistakes will not expose them to liability for violating federal law, but claims that the companies it contracts with to carry out the same functions on its behalf are out of luck. U.S. Br. 23-25. That argument—a clear departure from its prior positions—should be rejected.

The government argues (at 27-29) that *Yearsley* had nothing to do with immunity but just held that the government may "privilege" a contractor to take actions the government itself could take. In other words, according to the government, *Yearsley* applied a derivative *privilege* doctrine, not a derivative *immunity* doctrine. But that reading of *Yearsley* does not hold up. For starters, as the government admits (at 28), "*Yearsley* did not discuss the distinction between 'privileges' and 'immunities,'" an odd omission, to say the least, if the government were right.

Moreover, just a few years after *Yearsley*, this Court stated that *Yearsley* established that "government contractors obtain certain *immunity* in connection with work which they do pursuant to their contractual undertaking with the United States." *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583 (1943) (emphasis added). Oops. The government's only

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[7] The Westfall Act is not an "obstacle" (Resp. Br. 47) because it has not been interpreted to preclude employee immunity for the kind of mistakes at issue here.

response is to suggest (at 29 n.11) that this Court *meant* to say "privilege," not "immunity." But then why did *Brady* point to *Yearsley*'s "immunity" holding immediately after teeing up whether respondent could obtain "[i]mmunity from suit" (317 U.S. at 583)?

The government's position represents an abrupt about-face from its prior representations to this Court. In *Yearsley*, for example, it said it was "obvious" that "a government agent acting under authority validly conferred by the government cannot be *subjected to suit* on account thereof." U.S. Br. 20, *Yearsley*, 309 U.S. 18 (1940) (No. 156), 1939 WL 48388 (emphasis added). Likewise, just last term, the government referred to *Yearsley* as a "derivative sovereign immunity" case. *See* U.S. Br. 18-19, *KBR, Inc. v. Metzgar*, No. 13-1241 (Dec. 16, 2014), 2014 WL 7185601. The government tries to spin that now (U.S. Br. 30-31 n.12), but it points to nothing that would account for the new doctrinal approach the government asks the Court to embark on today—an analysis, as far as we can tell, no lower court has ever applied before.

The government's new position is simply an attempt to protect its own employees (who it acknowledges could not be sued for sending the texts at issue, U.S. Br. 32), while leaving contractors "holding the bag" (*Filarsky*, 132 S. Ct. at 1666) for the same acts. The government is of course free to change positions when it wishes. But it is the government's prior position, not its new one, that serves the Nation's interests in ensuring that the government is able to attract and harness the "specialized knowledge or expertise" (*id.* at 1665) of private individuals and, yes, corporations too, to carry out vital government objectives, like recruiting for the Nation's defense.

4. This Court has made clear that "immunity analysis rests on functional categories, not on the status of the defendant." *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983). Affording immunity to contractors doing the government's work advances the same vital public interests as granting immunity to individuals doing the government's work. Pet. Br. 38-41, 48-50; *see Metzgar v. KBR, Inc. (In re KBR, Inc.)*, 744 F.3d at 344 ("*Yearsley* furthers the same policy goals that the Supreme Court emphasized in *Filarsky*."); *see also Sherman v. Four Cty. Counseling Ctr.*, 987 F.2d 397, 403 n.4 (7th Cir. 1993) (finding "no persuasive reason to distinguish between a private corporation and a private individual" for purposes of qualified immunity); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 723 (10th Cir. 1988) (same).

If the Navy had hired a private individual (or team of individuals) to fulfill Campbell-Ewald's role, that individual or team would enjoy immunity on the facts here, just as the Navy's own employees would. *See Filarsky*, 132 S. Ct. at 1665. The result cannot be different simply because Campbell-Ewald is "a corporation (as distinct from an individual)." U.S. Br. 27. As Justice Holmes explained in *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922), in evaluating whether a government agent is entitled to immunity. "it cannot matter that the agent is a corporation rather than a single man." *Yearsley*, in which the defendant was a corporation, illustrates the point.

Richardson v. McKnight, 521 U.S. 399, 409 (1997), is not to the contrary. *Cf.* Resp. Br. 51 n.16. As this Court has explained, *Richardson* was a "narrow[]" decision that turned on its unique facts—the

management of a lengthy administrative task with "limited direct supervision" by the government. *Filarsky*, 132 S. Ct. at 1667 (citation omitted). Here, the Navy was "in constant contact with Campbell-Ewald on a daily basis," and closely supervised every deliverable. JA 46-47; *see* Pet. Br. 45-46; Pet. App. 33a.

Likewise, the government's reliance (at 26) on isolated language in *Sloan Shipyards* and *Brady* is misplaced. Those cases involved the distinct question whether the United States or an agent thereof was the proper defendant in certain actions under the Suits in Admiralty Act. *See Sloan Shipyards*, 258 U.S. at 564; *Brady*, 317 U.S. at 577, 584. As for the question here, *Brady* reaffirmed that "[i]t is, of course, *true* that government contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertaking with the United States." 317 U.S. at 583 (emphasis added) (citing *Yearsley*).[8]

Ultimately, whatever label this Court chooses to put on the doctrine, this case offers an opportunity for the Court to clarify that contractors, no less than individuals, are entitled to immunity when they are acting on behalf of the government, under its close supervision, and within the scope of their contract—just as Campbell-Ewald was here. Pet. Br. 45-46.

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[8] To the extent the government suggests (at 26 (quoting *Sloan Shipyards*, 258 U.S. at 567-68)) that these cases stand for the broader principle that a government agent is always "'answerable for his acts,'" that proposition is contradicted by *Yearsley* too—not to mention *Filarsky* and other cases recognizing that government agents enjoy immunity.

C. At A Minimum, Campbell-Ewald Is Immune From Vicarious Liability

This Court has long recognized that "[a] public officer *or agent* is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, *of the subagents or servants or other persons properly employed by or under him*, in the discharge of his official duties." *Robertson v. Sichel*, 127 U.S. 507, 515-16 (1888) (emphases added); *see* Joseph Story, *Commentaries on the Law of Agency* § 321 (4th ed. 1851) (same); Pet. Br. 46-47. The government—which has embraced this principle in prior cases (*e.g.*, Pet. Br. 44, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (No. 07-1015), 2008 WL 4063957)—ignores this principle here and pretends that Campbell-Ewald, not MindMatics, prepared the opt-in list and sent the text message at issue.[9]

Plaintiff argues (at 57 n.17) that "the TCPA incorporates vicarious liability." But that is beside the point. This immunity operates *against* vicarious liability—just like the immunity of the Naval officer who authorized the text message campaign protects him. Moreover, as Campbell-Ewald has explained (at 43-44), the TCPA, like all statutes, was enacted against the backdrop of this immunity. Even if the TCPA generally provides for vicarious liability, it also incorporates the immunity against vicarious liability

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[9] There can be no question that Campbell-Ewald qualifies as the Navy's agent. Restatement (Third) of Agency § 1.01 (2006). Indeed, Plaintiff's complaint admits that Campbell-Ewald was acting "on behalf of the U.S. Navy" (JA 19-20).

long recognized by this Court in the circumstances here. *Robertson*, 127 U.S. at 515-16.

It is undeniable that (1) the contract authorized Campbell-Ewald to hire subcontractors; (2) the Navy approved Campbell-Ewald's hiring of MindMatics to prepare the opt-in list and send text messages to those on the list, after Campbell-Ewald advised the Navy that MindMatics would do that; and (3) MindMatics, not Campbell-Ewald, compiled the opt-in list and sent the text messages. Pet. Br. 5-6, 45-46; *see* JA 52, 182, 232-34. Those facts not only establish that everything that Campbell-Ewald did was authorized by the Navy, but also entitle Campbell-Ewald to immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

CAMPBELL-EWALD COMPANY, PETITIONER

v.

JOSE GOMEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether respondent's individual claim for damages became moot when petitioner offered to pay respondent an amount greater than the maximum damages that respondent could have obtained by litigating that individual claim to judgment, and respondent did not accept the offer.

2. Whether respondent's assertion of a class claim under Federal Rule of Civil Procedure 23 alters the proper mootness analysis.

3. Whether petitioner was entitled to "derivative sovereign immunity" from respondent's suit because respondent's claims arose out of petitioner's performance of a contract with the federal government.

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BRIEF FOR THE UNITED STATES
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INTEREST OF THE UNITED STATES

This case presents the question whether a defendant can moot a putative class action by offering to pay the named plaintiff the full amount of damages that the plaintiff could obtain by successfully litigating his individual claim to judgment. The United States has a significant interest in the resolution of that question. The United States is charged with enforcing numerous laws establishing private rights of action through which individuals may seek redress in individual or class actions. The United States is also a potential defendant in such suits.

This case presents the further question whether a federal contractor may be held liable for violating the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. 227, if the contractor's allegedly unlawful

actions were taken while executing a contract with the federal government. The United States has a substantial interest in that question, both because the Federal Communications Commission (FCC) administers the TCPA and because the liability of numerous federal contractors could be affected by the Court's decision.

STATEMENT

1. As relevant here, the TCPA prohibits "any person" in the United States from "mak[ing] any call * * * using any automatic telephone dialing system" to "any telephone number assigned to a * * * cellular telephone service," unless the call is made "for emergency purposes" or with the "prior express consent of the called party." 47 U.S.C. 227(b)(1)(A)(iii). The FCC has authority to adopt regulations implementing Section 227(b) and to issue "rules[s] or order[s]" addressing questions arising under the Act. 47 U.S.C. 227(b)(2); see 47 U.S.C. 154(i). The FCC has construed the TCPA prohibition described above as applying to both "voice calls and text calls to wireless numbers." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14,014, 14,115 (2003). Neither party disputes that interpretation. Pet. App. 3a.

Congress created a private right of action to redress violations of Section 227(b) through damages or injunctive relief. 47 U.S.C. 227(b)(3); see *Mims* v. *Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012). In such an action, the plaintiff is entitled "to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater." 47 U.S.C. 227(b)(3). A court may

treble the damages award if it finds that the defendant violated the TCPA "willfully or knowingly." *Ibid.*

2. In performing a marketing contract with the United States Navy, petitioner caused to be sent approximately 100,000 text messages. Pet. App. 2a; Pet. 5. Under that contract, petitioner was responsible for developing and implementing a Navy recruiting campaign targeting young adults. Pet. App. 2a. Although the Navy approved the content of a text message, *ibid.*, it "intended the messages to be sent only to individuals who had consented or 'opted in' to receive messages like the recruiting text," *id.* at 4a. Construed in the light most favorable to respondent (the non-moving party), the summary-judgment evidence indicated that "[petitioner] was not authorized to send texts to individuals who had not opted in," *ibid.*, and that petitioner had agreed "to send [the] messages only to cellular users that had consented to solicitation," *id.* at 2a.

Petitioner hired a subcontractor, MindMatics, to generate a list of opt-in recipients and send the text message to them. Pet. App. 2a. Respondent contends that he received a text message without his consent. *Id.* at 2a-3a; J.A. 20.

3. In 2010, respondent filed this suit in federal district court. Pet. App. 2a. His class-action complaint (J.A. 16-24) alleged that petitioner had violated the TCPA by sending text messages to respondent's and others' cellular phones without consent. J.A. 20, 23. The complaint asked the district court to certify a class of all persons who had received one or more "unauthorized text message advertisements" from petitioner. *Ibid.* The complaint also requested injunc-

tive relief, trebled actual and statutory damages, and reasonable attorney's fees and costs. J.A. 23.

Before petitioner responded to the complaint, the parties stipulated that the class-certification-motion deadline should be extended until after petitioner had filed its response and respondent had received an opportunity to conduct precertification discovery. Pet. App. 37a. Petitioner agreed that it would be "inefficient for the Court and the parties to expend resources on class certification-related activities before [petitioner] ha[d] responded to the Complaint and before any threshold motions [had been] resolved." *Ibid.*

Before discovery commenced, petitioner tendered to respondent an offer of judgment (Pet. App. 52a-56a) under Federal Rule of Civil Procedure 68. See Pet. App. 48a. A valid Rule 68 settlement offer must, *inter alia*, propose entry of judgment for the plaintiff on specified terms, Fed. R. Civ. P. 68(a), and may "not implicitly or explicitly provide that the judgment *not* include costs." *Marek* v. *Chesny*, 473 U.S. 1, 6 (1985). If the plaintiff accepts a valid Rule 68 offer within 14 days and a party "file[s] the offer and notice of acceptance" with proof of service, the district court clerk must enter judgment accordingly. Fed. R. Civ. P 68(a). If the plaintiff does not accept the offer and ultimately obtains a judgment no more favorable than the offer, the plaintiff must pay the "costs" incurred after the offer was made, including any attorney's fees properly treated as "costs." Fed. R. Civ. P. 68(d); see *Marek*, 473 U.S. at 10-11. Rule 68 further provides that "[a]n unaccepted offer is considered withdrawn," and that "[e]vidence of an unaccepted offer is not

admissible except in a proceeding to determine costs." Fed. R. Civ. P. 68(b).

Petitioner's Rule 68 offer proposed the entry of a district court judgment against petitioner that would have awarded respondent (a) permanent injunctive relief, (b) $1503 in damages for each unauthorized text message that respondent had received, and (c) "reasonable costs allowable under law." Pet. App. 53a; see *id.* at 55a-56a (proposed injunction). Petitioner's contemporaneous settlement letter (*id.* at 57a-59a) explained that its "offer d[id] not include attorneys' fees" requested in respondent's complaint. *Id.* at 58a. Consistent with Rule 68, the offer stated that it "shall be deemed withdrawn unless written notice of acceptance is received within fourteen days of service." *Id.* at 54a. Because respondent failed to respond within 14 days, the offer "lapse[d] in accordance with its own terms." *Id.* at 3a.

Petitioner then moved to dismiss the action for want of jurisdiction, arguing that the unaccepted Rule 68 offer had rendered respondent's claim moot. On the same day, respondent moved for class certification. J.A. 7-8. The district court denied petitioner's motion to dismiss, Pet. App. 40a-49a, and struck from the record the offer of judgment (*id.* at 52a-56a) that petitioner had filed, explaining that "Rule 68 does not allow a party to file a Rule 68 offer unless it has been accepted," *id.* at 49a. The court deferred ruling on class certification "until after the parties have had an opportunity to engage in class discovery." *Id.* at 50a.

After limited discovery, petitioner moved for summary judgment, arguing that its status as a federal contractor entitled it to "derivative sovereign immunity." Pet. App. 30a; J.A. 11. Cf. Dist. Ct. Doc. 129

(10/31/2011) (discovery status report). The district court granted petitioner's motion. Pet. App. 22a-34a. The court concluded that, "[i]nasmuch as [petitioner] acted on behalf of the Navy, it is also immune under the doctrine of derivative sovereign immunity established by the Supreme Court in *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18, 21-22 [1940]." *Id.* at 30a; see *id.* at 30a-34a. The district court entered final judgment (J.A. 14) without separately denying respondent's pending motion for class certification.

4. The court of appeals vacated and remanded. Pet. App. 1a-21a. As relevant here, the court held that petitioner's unaccepted offer of judgment did not moot respondent's action, *id.* at 4a-7a, and that petitioner was not entitled to "derivative sovereign immunity," *id.* at 14a-20a.[1]

a. The court of appeals rejected petitioner's mootness argument, relying on its then-recent holding that "[a]n unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot." Pet. App. 5a (quoting *Diaz* v. *First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 950 (9th Cir. 2013)).[2] The court further held that an unaccepted

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[1] The court rejected petitioner's remaining contentions, including petitioner's argument that it could not be held vicariously liable for the actions of its subcontractor. Pet. App. 10a-14a.

[2] In *Diaz*, the court of appeals noted that a majority of the Court in *Genesis HealthCare Corp.* v. *Symczyk*, 133 S. Ct. 1523 (2013), had reserved the question, but that four dissenting Justices and the Solicitor General had concluded that an unaccepted offer of judgment could not moot a plaintiff's underlying claim. 732 F.3d at 952-953. *Diaz* concluded that "Justice Kagan['s dissenting opinion in *Genesis HealthCare*] has articulated the correct approach." *Id.* at 954; see *id.* at 953-955.

offer of judgment likewise does not render a class action moot. *Id.* at 5a-7a.

b. The court of appeals held that the district court had erred by granting petitioner derivative sovereign immunity. Pet. App. 14a-20a. The court stated that this Court's decision in *Yearsley*, which involved a contractor whose damage-causing actions were required by its contract with the United States, was "not applicable" because *Yearsley* had "established a narrow rule regarding claims arising out of property damage caused by public works projects." *Id.* at 15a.

SUMMARY OF ARGUMENT

I. Neither petitioner's offer to settle this case by paying respondent the full value of his individual claim, nor respondent's failure to accept that offer, rendered this case moot.

A. Petitioner's settlement offer did not moot respondent's individual claim. If the mere communication of a Rule 68 offer of judgment could moot a case, the offer would foreclose the court from performing the action—entry of judgment for the plaintiff in accordance with the offer—that Rule 68(a) mandates if the offer is accepted. And if the mere communication of an offer to pay the plaintiff's individual claim in full does not moot the case, the plaintiff's refusal to accept the offer cannot have that effect. Under Rule 68(b), "[a]n unaccepted offer is considered withdrawn," and the plaintiff is left as before with an unsatisfied claim that a court can redress if the claim is found to have merit.

Although petitioner argues that respondent's individual claim is moot, petitioner also contends that the district court may enter judgment in respondent's favor on that claim in accordance with petitioner's

prior Rule 68 offer. That combination of arguments is self-contradictory, because a district court that has been divested of jurisdiction can do nothing more than dismiss the case. Although entry of judgment in the plaintiff's favor is sometimes the appropriate course of action when the defendant offers to capitulate, the propriety of that disposition depends on the understanding that the offer does *not* render the case moot.

The nineteenth-century decisions of this Court on which petitioner relies do not support its cause. Those decisions address the effect of a plaintiff's *acceptance* of full payment, not the effect of an unaccepted settlement offer.

If a defendant offers to surrender by agreeing to *all* of the relief the plaintiff could realistically have obtained, and if further litigation would serve no other legitimate purpose, the court should enter judgment for the plaintiff in accordance with the defendant's offer, even if the plaintiff objects. Entry of judgment for the plaintiff, rather than dismissal of the action as moot, is the appropriate course of action in the (presumably rare) case where the plaintiff's obstinacy or vindictiveness prompts him to reject the defendant's capitulation. Entry of judgment in accordance with petitioner's Rule 68 offer would have been inappropriate, however, under the circumstances of this case. Petitioner's offer to pay the full value of respondent's individual claim did not give respondent all that he might have achieved by litigating the case, since entry of judgment on those terms would have prevented respondent from invoking the cost-sharing mechanisms of Rule 23.

B. Even if the Court concludes that petitioner's unaccepted settlement offer mooted respondent's indi-

vidual claim, respondent retained a litigable stake in the question whether class certification was appropriate, since certification of a class would have allowed respondent to shift litigation costs to other class members. That conclusion follows logically from this Court's decision in *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980), which petitioner has not asked the Court to overrule.

II. Petitioner is not entitled to "derivative sovereign immunity" from respondent's suit. This Court has consistently held that private companies performing work for the federal government do not acquire the government's own immunity from suit. Those decisions are consistent with the common-law rule that immunities are not delegable but rather are personal to those who possess them. Individuals who perform governmental functions may assert qualified immunity from liability for wrongs they commit in that capacity. But the question of qualified immunity is not before this Court, and petitioner cites no decision in which this Court has held that a corporate entity (as distinct from an individual) was entitled to such immunity, let alone demonstrate that it meets the distinct requirements of a qualified-immunity claim.

Because the United States and its agencies are not subject to the substantive prohibitions imposed by the TCPA, federal agencies have a "privilege" to engage in conduct that private actors could not lawfully undertake. The Navy therefore could lawfully have sent automated recruiting text messages to unconsenting recipients like respondent. Unlike immunities, privileges have traditionally been delegable, and the Navy might have been able to delegate to petitioner its privilege of making such calls. The Navy did not do

so, however, but instead authorized petitioner to send recruiting texts only to individuals who had opted in.

ARGUMENT

I. PETITIONER'S OFFER OF JUDGMENT DID NOT RENDER THIS CASE MOOT

A. Petitioner's Unaccepted Settlement Offer Did Not Render Moot Respondent's Individual Claim

The court of appeals correctly held that respondent's individual TCPA claim is not moot. Neither petitioner's communication of a settlement offer, nor respondent's failure to accept that proposal, deprived the district court of jurisdiction over that claim.

1. To establish an Article III "case" or "controversy," a plaintiff must show that he possessed Article III standing when "the action commence[d]." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000) (*Laidlaw*). "[A]n actual controversy must [also] be extant at all stages of review, not merely at the time the complaint is filed." *Genesis HealthCare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1528 (2013) (citation omitted). "A case becomes moot," however, "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Decker* v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1335 (2013) (quoting *Knox* v. *Service Emps. Int'l Union*, 132 S. Ct. 2277, 2287 (2012)); accord *Chafin* v. *Chafin*, 133 S. Ct. 1017, 1023 (2013) (same). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin*, 133 S. Ct. at 1023 (citation omitted).

A defendant's unaccepted offer to settle a plaintiff's claim does not render the claim moot because it does not prevent the court from granting the plaintiff relief. This

Court has long recognized that, because "an offer * * * imposes no obligation until it is accepted," the offeree's rejection of a settlement proposal "leaves the matter as if no offer had ever been made." *Minneapolis & St. Louis Ry.* v. *Columbus Rolling Mill*, 119 U.S. 149, 151 (1886); see *Eliason* v. *Henshaw*, 17 U.S. (4 Wheat.) 225, 228 (1819). Rule 68 incorporates that longstanding principle. Rule 68(b) provides that "[a]n unaccepted offer is considered withdrawn," and that "[e]vidence of an unaccepted offer is not admissible, except in a proceeding to determine costs" under Rule 68(d).

The Court in *Genesis HealthCare* reserved the question whether an unaccepted offer of judgment can moot an individual plaintiff's claim. 133 S. Ct. at 1528-1529. The government argued (*id.* at 1528), however, and Justice Kagan's opinion for four dissenting Justices concluded, that "an unaccepted offer of judgment cannot moot a case." *Id.* at 1533 (Kagan, J., dissenting). The dissenting Justices explained that, if the plaintiff declines such an offer, both "her interest in the lawsuit" and "the court's ability to grant her relief" remain as they were before. *Ibid.*; see *id.* at 1535 (concluding that an unaccepted settlement offer "is a legal nullity" having no effect on a dispute's justiciability). Since *Genesis HealthCare* was decided, every court of appeals that has resolved the issue—including the Seventh Circuit, which overruled its earlier precedents on the question—has held that an unaccepted offer of judgment cannot moot a plaintiff's claim. See *Bais Yaakov* v. *ACT, Inc.*, No. 14-1789, 2015 WL 4979406, at *5-*6 (1st Cir. Aug. 21, 2015); *Hooks* v. *Landmark Indus., Inc.*, No. 14-20496, 2015 WL 4760253, at *3 (5th Cir. Aug. 12, 2015); *Chapman* v. *First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878, at *3 (7th Cir. Aug.

6, 2015) (overruling earlier Seventh Circuit decisions by using the court's mini-en-banc process, see 7th Cir. R. 40(e)); *Tanasi* v. *New Alliance Bank*, 786 F.3d 195, 200 (2d Cir. 2015), petition for cert. pending, No. 15-84 (filed July 17, 2015); *Stein* v. *Buccaneers Ltd. P'ship*, 772 F.3d 698, 702-704 (11th Cir. 2014); *Diaz* v. *First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 954-955 (9th Cir. 2013).[3]

2. The certiorari petition frames the question presented as whether a case becomes moot "when the plaintiff *receives* an offer of complete relief on his claim." Pet. i (emphasis added). That formulation, as well as similar language in petitioner's brief on the

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[3] In *Russell* v. *United States*, 661 F.3d 1371, 1374-1375, 1377 (2011), the Federal Circuit accepted the government's argument as appellee that the damages claim of the named plaintiff was rendered moot by the government's tender of a check that—like its payments to thousands of others in the putative class—covered the full amount claimed by the plaintiff (who declined to cash the check). The government relied on Federal Circuit precedent, which the government has since concluded is incorrect. See U.S. Amicus Br. at 13 n.1, *Genesis HealthCare*, *supra* (No. 11-1059).

When a plaintiff timely seeks retrospective relief for a past wrong, the wrong has been completed by the time the claim is filed. Any damages liability therefore is fixed and will continue until the claim is resolved by a judgment or a settlement agreement grounded, like any contract, on mutual assent.

Different considerations apply when a plaintiff seeks prospective relief for an ongoing or imminent injury caused by the defendant's challenged actions. If the defendant ceases those actions after the suit is filed, it can terminate the underlying injury and associated liability for prospective relief, regardless of the plaintiff's consent. Yet even in that "voluntary cessation" context, the claim for prospective relief becomes moot only if the defendant shows that it is "absolutely clear" that the "allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189-190.

merits (see, *e.g.*, Br. 13, 16, 20, 21), suggests that this case became moot as soon as petitioner communicated its settlement offer. That cannot be right. If a settlement offer alone could moot a claim, the district court would lack authority to do the very thing that Rule 68(a) requires if the plaintiff accepts the offer: enter judgment for the plaintiff based on the parties' agreement. See *Chapman*, 2015 WL 4652878, at *3. "[N]o one thinks (or should think) that a defendant's offer to have the court enter a consent decree [or judgment] renders the litigation moot and thus prevents the injunction's [or judgment's] entry." *Ibid.*

In the district court, petitioner moved to dismiss this suit on mootness grounds immediately after the expiration of Rule 68(a)'s 14-day period for acceptance of a defendant's settlement offer. That timing suggests that petitioner viewed respondent's failure to accept the settlement offer within the prescribed period, rather than the initial communication of the offer, as the event that rendered this case moot. But if tendering the offer did not divest the court of jurisdiction, respondent's subsequent failure to accept it could not have that effect. "After the offer lapsed, just as before, [respondent] possessed an unsatisfied claim, which the court could redress by awarding h[im] damages." *Genesis HealthCare*, 133 S. Ct. at 1534 (Kagan, J., dissenting).[4]

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[4] Even when a plaintiff actually enters a settlement agreement that the defendant fulfills, if the plaintiff continues to assert a settled claim, that claim should be adjudicated against the plaintiff, not dismissed as moot. Such a settlement gives rise to the defense of "accord and satisfaction." See 2 Restatement (Second) of Contracts § 281 & cmt. a, at 381-382 (1981); 2 Restatement (First) of Contracts § 417 & cmt. a, at 785-786 (1932). Entry of a consent

3. The argument that respondent's action became moot (either when petitioner made its settlement offer or when respondent failed to accept it) logically implies that the district court should have dismissed the suit, leaving respondent empty-handed. "When [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause," because "[w]ithout jurisdiction the court cannot proceed at all." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)). That disposition, which would produce the same practical outcome as a judgment in petitioner's favor, obviously could not be said to "afford the plaintiff complete relief." Pet. Br. 20.

To avoid the strange result that would logically follow from a finding of mootness, petitioner contends (Br. 10, 21) that a "case should be dismissed as moot" when a defendant offers to provide complete relief, but that the "court also has authority to dispose of the case by entering judgment according to the defendant's offer." That combination of arguments is self-contradictory. Because an event that moots a case thereby divests the district court of jurisdiction, "entering judgment according to the defendant's offer of complete relief" (*id.* at 10)—*i.e.*, entering judgment in favor of the plaintiff—is permissible only if the defendant's settlement offer does *not* moot the controversy. Although entry of judgment in

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judgment likewise supports a res-judicata defense. Those affirmative defenses, see Fed. R. Civ. P. 8(c)(1), are not jurisdictional, however, and may be forfeited if not timely asserted. See *Wood* v. *Milyard*, 132 S. Ct. 1826, 1832 (2012); *Knowles* v. *Iowa*, 525 U.S. 113, 116 n.2 (1998); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995); *Illinois Cent. R.R.* v. *Adams*, 180 U.S. 28, 32 (1901) (holding that "res judicata * * * [i]s not a question affecting the jurisdiction of th[e] court") (citation omitted).

the plaintiff's favor is sometimes the appropriate course of action when a defendant offers to capitulate (see pp. 17-18, *infra*), that is not the disposition that petitioner requested in the courts below. Nor is petitioner's current advocacy of that disposition fairly encompassed within the first question presented in the certiorari petition, which asks "[w]hether a case becomes moot, *and thus beyond the judicial power of Article III*, when the plaintiff receives an offer of complete relief on his claim." Pet. i (emphasis added).[5]

4. Petitioner relies (Br. 16-18) on three nineteenth-century decisions of this Court. None suggests that an unaccepted settlement offer of complete relief moots the underlying claim.

In *California* v. *San Pablo & Tulare Railroad*, 149 U.S. 308, 308-309 (1893), California brought suit to recover state and county taxes from a railroad. The State asserted that it had not "accepted" the railroad's offer of a sum that was "equal to the [unpaid] taxes, penalties, interest, and attorney's fees * * * and costs" that the State sought. *Id.* at 311-312. The railroad had already paid that sum to the State, however, under a California statute that effectively accepted the railroad's payment

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[5] Petitioner indicates that, even if respondent's suit is dismissed as moot, petitioner intends to pay respondent in accordance with petitioner's prior settlement offer. Pet. Br. 22 n.6. We do not question the sincerity of that representation. If the suit is dismissed as moot, however, any such payment would be legally gratuitous, since (a) the legal effect of a mootness dismissal is that the plaintiff is entitled to nothing, and (b) petitioner's settlement offer was "withdrawn" by its own terms when respondent did not accept it within 14 days, see Pet. App. 54a. Petitioner's stated intent to make a legally gratuitous payment if the suit is dismissed cannot divest respondent of his practical stake in the litigation.

on the State's behalf. See *id.* at 312. Pursuant to state law, the railroad had deposited that payment into a California bank in the State's name and had provided notice thereof to the State. *Ibid.*

In dismissing the writ of error, the Court explained that any obligation of the railroad to pay the State had been "extinguished" by the railroad's deposit, which under state law "ha[d] the same effect as actual payment and receipt of the money" by the State. *San Pablo*, 149 U.S. at 313-314. The Court concluded that the State's "cause of action ha[d] ceased to exist," *id.* at 313, because the State had "obtained everything that it could recover in th[e] case," *id.* at 314. That disposition reflects that a State may be required by its own governing law to accept a proffered payment settling a claim. A similar principle might apply more broadly if the normal contract-law principle of mutual assent, 1 Restatement (Second) of Contracts § 18, at 53 (1981), were displaced by a statute requiring a private plaintiff to accept a defendant's full payment of a disputed sum. Such a principle would be inapplicable here, however, because Rule 68 specifies that "an unaccepted offer is considered withdrawn." Fed. R. Civ. P. 68(b).

San Mateo County v. *Southern Pacific Railroad*, 116 U.S. 138 (1885), is even further afield. In *San Mateo*, the County accepted two payments from the defendant railroad. *Id.* at 138-139, 141. Because the two payments taken together exceeded the "entire sum estimated by the [County] to be due," *id.* at 141, this Court held that "the debt for which the suit was brought ha[d] been unconditionally paid and satisfied," so that the plaintiff county "no longer [had] an existing cause of action." *Id.* at 141-142. Although *San Mateo* reflects that a plaintiff's actual acceptance of full payment can extinguish a

claim, the decision does not address the effect of a *declined* settlement offer.

Little v. *Bowers*, 134 U.S. 547 (1890), similarly involved a railroad's challenge to municipal property taxes on a writ of error to this Court, which the city moved to dismiss on the ground that the plaintiff railroad had "paid and satisfied [its tax obligation] in full" and had paid the city its "costs in the case." *Id.* at 548-549. The Court concluded that the railroad's payment "was in the nature of a compromise, by which the city agreed to take, and the [railroad] agreed to pay, a less sum than was originally assessed." *Id.* at 556; see *id.* at 549-550. Dismissal was warranted, the Court concluded, because "[t]he effect of [that compromise] was to extinguish the controversy between the parties." *Id.* at 556. As in *San Mateo*, the Court did not address the effect of a rejected settlement proposal.

5. Although an unaccepted offer of complete relief cannot moot a plaintiff's claim, courts should be reluctant to expend judicial and litigation resources adjudicating the merits of a demand for relief that the defendant informs the court it will fully satisfy. That legitimate impulse, however, suggests that the court should enter judgment *for* the plaintiff, not against him. That is the proper course for a court to follow if the plaintiff identifies no additional relief that he could realistically obtain, cf. Fed. R. Civ. P. 54(c), and if further litigation would serve no other legitimate purpose. In the present circumstances, however, it would have been inappropriate for the district court to terminate this suit by entering judgment in respondent's favor on his individual claim, even if petitioner had requested that disposition below. Because that disposition would have prevented respondent from invoking the cost-sharing mechanisms of Rule

23, it would not have provided respondent complete relief on the (individual and class) claims asserted in his complaint.

"[T]he principle of party presentation [is] basic to our adversary system," *Wood* v. *Milyard*, 132 S. Ct. 1826, 1833 (2012), which rests on the "premise that the parties know what is best for them" and "rel[ies] on the parties to frame the issues for decision," *Greenlaw* v. *United States*, 554 U.S. 237, 243-244 (2008). A defendant therefore may elect not to contest liability and to litigate only the scope of relief. Or a defendant may decide not even to contest relief. If a defendant knowingly accepts an adverse judgment for the full relief sought rather than litigating the merits, a court may rely on that choice by exercising its discretion to enter judgment upon it. See *Genesis HeathCare*, 133 S. Ct. at 1536 (Kagan, J., dissenting); see also, *e.g.*, *Tanasi*, 786 F.3d at 200; *O'Brien* v. *Ed Donnelly Enters., Inc.*, 575 F.3d 567, 575 (6th Cir. 2009).[6]

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[6] Although a court's entry of judgment pursuant to the defendant's surrender is sometimes described as "moot[ing]" the claim, *e.g.*, *Tanasi*, 786 F.3d at 200, that characterization is imprecise. While a defendant's capitulation may obviate the need for the court to make an independent assessment of the merits, the court nevertheless *adjudicates* the claim when it renders judgment pursuant to the defendant's consent. Unlike most judgments, however, a judgment based on the defendant's consent ordinarily will have no future issue-preclusive effect, because the merits of the case are not "actually litigated and determined" and because the judgment does not rest on a resolution of the merits. *Bobby* v. *Bies*, 556 U.S. 825, 834 (2009) (citation omitted); see 1 Restatement (Second) of Judgments § 27 cmt. e, at 257 (1982) (Absent an agreement that the judgment will have issue-preclusive effect, issue preclusion does not apply "[i]n the case of a judgment entered by confession, consent, or default.").

When a plaintiff has asserted a colorable class-wide claim, however, a court would abuse its discretion by entering judgment for the plaintiff on his individual claim before resolving the question of class certification. If the plaintiff has asserted a class claim, an offer of full relief for his individual claim alone fails to "offer[] all that has been requested in the complaint (*i.e.*, relief for the class)." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 341 (1980) (Rehnquist, J., concurring). As a result, "[a]cceptance [of such a less-than-complete offer] need not be mandated," *ibid.*, when the question of class certification remains outstanding.

Rule 23 confers upon plaintiffs a "procedural right" to "assert their own claims in the framework of a class action." *Roper*, 445 U.S. at 332. Allowing a plaintiff to proceed on his individual claim within a class action serves important policy interests. A plaintiff may utilize the class-action mechanism to distribute the costs of litigation across the class. *Id.* at 338 & n.9. A defendant can reduce the litigation expenses that multiple lawsuits might entail, since a judgment favorable to the defendant will bind all class members. Consolidation of claims likewise can conserve limited judicial resources. By contrast, "[r]equiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained," would "frustrate the objectives of class actions," would be "contrary to sound judicial administration," and would "invite waste of judicial resources by stimulating successive suits brought by others." *Id.* at 339 (dictum).

B. Under *Roper*, Respondent Would Retain A Sufficient Interest To Pursue Class Certification Even If His Individual Claim Were Moot

Because petitioner's unaccepted settlement offer did not moot respondent's individual claim, the Court need not address the second question presented. But if the Court concludes that the unaccepted offer did moot the individual claim, respondent would retain a separate financial interest in class certification that would allow his action to remain live through the district court's class-certification decision. That proposition follows from this Court's decision in *Roper*, which petitioner has not asked the Court to overrule. Pet. Br. 33. If the court subsequently certifies a class, the class would "acquire[] a legal status separate from the interest asserted by the [named plaintiff]," *Sosna* v. *Iowa*, 419 U.S. 393, 399 (1975), that would itself be sufficient to allow a full adjudication of the merits.

In *Roper*, the plaintiffs brought a putative class action for damages. After the district court denied class certification, the court entered judgment for the plaintiffs (over their objection) and dismissed their suit based on the defendant's offer to pay the plaintiffs' individual claims in full. 445 U.S. at 329-330. The defendant then paid the judgment into the court registry. *Id.* at 330.

This Court held that the entry of judgment for the named plaintiffs on their individual claims did not moot their "individual and private case or controversy," because they retained an ongoing "economic interest in class certification" that allowed them to appeal the adverse certification ruling. *Roper*, 445 U.S. at 332-333. The Court held that the plaintiffs possessed an economic interest in class certification because certification would enable them to recover attorney's fees

and costs by "allocating such costs among all members of the class who benefit from any recovery." *Id.* at 334 n.6, 336, 338 n.9. Cf. *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478-479 (1980) (holding that named plaintiff may obtain common-fund fee award from a money judgment obtained by a class). The Court explained that the class-certification ruling was "collateral to the merits" of the litigation, and that the court of appeals could adjudicate the plaintiffs' challenge to that ruling without "passing on the merits of the substantive controversy." *Roper*, 445 U.S. at 336.

Respondent possesses precisely the same economic interest as the *Roper* plaintiffs in shifting his litigation expenses to the class. To be sure, *Roper* involved an appeal from the denial of class certification, whereas the district court made no certification ruling in this case. But if a named plaintiff's "economic interest in class certification" (445 U.S. at 333) is sufficient to allow him to appeal an adverse certification ruling, notwithstanding the defendant's full payment of the plaintiff's individual claim, the same interest is likewise sufficient to allow the plaintiff to litigate that collateral issue in district court either directly or on remand from an appeal.

Petitioner argues (Br. 33) that *Roper* is "inapplicable" here because *Genesis HealthCare* "made clear that *Roper* is limited to its facts." That is incorrect. *Genesis HealthCare* acknowledged *Roper*'s holding that "the named plaintiffs possessed an ongoing, personal economic stake" in "shift[ing] a portion of attorney's fees and expenses to successful class litigants." 133 S. Ct. at 1532. The Court also noted that *Roper* contained dicta emphasizing the importance of class-certification decisions and the undesirability of allowing defendants to "pick off" named plaintiffs, *ibid.*, and it expressly declined to con-

sider whether *Roper*'s "continuing validity" had been eroded by subsequent decisions, *id.* at 1532 n.5. Petitioner has not asked this Court to overrule *Roper*. Cf., *e.g.*, *Alabama* v. *North Carolina*, 560 U.S. 330, 355 n.6 (2010) (declining to overrule precedent *sua sponte* without the benefit of argument from the parties). Under that decision, respondent would retain a sufficient interest to pursue class certification in district court even if petitioner's settlement offer had rendered his individual claim moot.[7]

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[7] Although "a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit," *Steel Co.*, 523 U.S. at 107, respondent clearly had Article III standing when he filed his complaint. The determination whether the district court was divested of the Article III jurisdiction it initially possessed is governed by doctrinal rules different from, and somewhat less rigid than, those governing the initial standing inquiry. See *Laidlaw*, 528 U.S. at 189-192 (discussing exceptions to mootness that would not support Article III standing). It is particularly appropriate to distinguish between these two contexts because respondent, in making his initial decision to commence suit, could legitimately rely on the potential for cost-shifting provided by the Rule 23 mechanism. See Resp. Br. 32, 35, 41-43.

In *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472 (1990), the Court held that, where an intervening statutory amendment had deprived the plaintiff of any continuing stake in the underlying merits issue, the plaintiff's interest in recovering its attorney's fees—which the plaintiff could have recovered only if it ultimately "'prevail[ed]' by winning the relief it seeks" at the end of the case—did not provide a constitutionally sufficient basis for continued appellate litigation of that merits question. *Id.* at 478, 480. That holding is not logically inconsistent with *Roper*'s conclusion that a plaintiff's "economic interest in class certification" as a predicate to a common-fund fee award based on the class's own recovery can enable him to pursue such certification as a discrete matter "collateral to the merits." 445 U.S. at 333, 336. Indeed, even after lawsuits are resolved on the merits, parties frequently continue to

II. PETITIONER IS NOT ENTITLED TO "DERIVATIVE SOVEREIGN IMMUNITY"

Petitioner argues (Br. 35-50) that it is entitled to "derivative sovereign immunity" because its alleged violation of the TCPA occurred while petitioner was executing its contract with the Navy. That is incorrect.

The government utilizes contractors to perform various functions on the government's behalf. In doing so, the government ordinarily can authorize contractors to take actions that the government could lawfully perform itself. That principle flows, not from any derivative "immunity" from liability for unlawful acts, but from the common-law rule that a principal may delegate to its agents its own "privilege" to take certain actions *lawfully*. That common-law agency rule does not aid petitioner, however, because the government never authorized petitioner to send text messages to unconsenting recipients.

1. Federal agencies are not subject to the substantive prohibitions imposed by the TCPA. The TCPA prohibits "any person" from taking specified actions, 47 U.S.C 227(d)(1), without defining the term "person" to include the United States or its agencies. The parties appear to agree that the United States and its agencies are not "person[s]" within the meaning of the TCPA. See Resp. Br. 8; Pet. Br. 2, 8. Cf. *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 780-781 (2000) (explaining that the term "person" is presumed "not [to] include the sovereign" when Congress has imposed new obligations on such persons).[8]

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litigate disputed collateral issues concerning their respective entitlements to fees and costs.

[8] This Court has held that the wiretap provisions of the Communications Act, 47 U.S.C. 605, apply to government agents as "per-

Federal agencies may conclude that the performance of particular governmental functions warrants making calls that, if made by a private person, would violate the TCPA. The Census Bureau, for instance, could conclude that its duty to conduct the decennial census, see 13 U.S.C. 141(a), warrants use of automated telemarketing and texting outreach to contact and identify members of the population without their advance consent. The TCPA does not prohibit such governmental calls, and it need not be read to prohibit the government from directing private contractors to make such calls on its behalf.

In various contexts, particular entities are "privileged to do an otherwise tortious act," 2 Restatement (Second) of Agency § 343 cmt. c, at 105 (1958), when a privilege "result[s] from the consent of another" or is "created by the law irrespective of consent," 1 *id.* § 217 cmt. a, at 469. Because the TCPA's prohibitions do not apply to federal agencies, those agencies possess a privilege to engage in conduct that private parties are forbidden to undertake. Ordinarily such "privileges are delegable," *i.e.*, the privilege holder can lawfully authorize another to perform the privileged act on the holder's behalf. *Ibid.* Whether a "privilege[] created by statute" is delegable or must be "exercised personally" is ultimately a question of statutory construction. 1 *id.* § 17 cmt. b, at 86; see 2 *id.* § 345 cmt. a, at 108.

By contrast, "an immunity frees one who enjoys it from a lawsuit whether or not he acted wrongly." *Richardson* v. *McKnight*, 521 U.S. 399, 403 (1997) (citing *Wyatt* v. *Cole*, 504 U.S. 158, 171-172 (1992) (Kennedy, J.,

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sons" under those provisions. See *Nardone* v. *United States*, 302 U.S. 379, 382-383 (1937). In the government's view, the term "person" in the TCPA carries a different meaning. That issue, however, is not before this Court.

concurring)). Immunities thus can "protect an admitted wrongdoer from civil liability" because "an overriding public policy" justifies the grant of immunity. 2 Restatement (Second) of Agency § 347 cmt. a, at 111. Although "sovereign immunity shields the Federal Government and its agencies from suit" absent a statutory waiver, *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994), a determination that the government is immune from a particular suit does not mean that the challenged governmental conduct was lawful. It simply means that courts are not authorized to grant *relief* based on the asserted violation of a legal duty. An immunity is thus quite different from a privilege, which serves to *legitimize* the conduct of the privilege-holder or his appropriate delegee.

Likewise, the qualified immunity held by individual officials is an "entitlement not to stand trial or face the other burdens of litigation." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). Qualified immunity, like immunity more generally, "is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Id.* at 527-528. So long as the official's actions did not violate a "clearly established" right, qualified immunity is warranted even when "the plaintiff's claim * * * in fact has merit." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2031 (2011) (citation omitted).

2. At common law, "[i]mmunities, unlike privileges, are not delegable and are available as a defense only to persons who have them." 1 Restatement (Second) of Agency § 217 cmt. b, at 470; see 2 *id.* § 347 cmt. a, at 111 ("Immunities * * * are strictly personal to the individual and cannot be shared."). That principle is reflected in this Court's decisions rejecting claims that a government agent or contractor shares in the United States' sovereign immunity.

In *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922) (Holmes, J.), the Court rejected the government's contention that the Emergency Fleet Corporation—a corporation wholly owned by the government and vested by the government with "enormous powers"—"share[d] the immunity of the sovereign from suit." *Id.* at 566; see *id.* at 565. The Court held that, because the United States' "immunity does not extend to those that acted in its name," an "agent [of the government], because he is agent, does not cease to be answerable for his acts." *Id.* at 567-568.

The Court reached the same result in *Brady* v. *Roosevelt Steamship Co.*, 317 U.S. 575, 576 (1943), in which a private contractor operated a government-owned vessel on behalf of the United States Maritime Commission. When a customs inspector died from an accident on that vessel, the contractor argued that it was "non-suable for [its] torts" because it could be sued only pursuant to the statutory waiver of the government's sovereign immunity in the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.* (1940). See 317 U.S. at 576-577. The Court rejected that contention, holding that the contractor could not obtain "[i]mmunity from suit" "by reason of a contract between [it] and the [federal government]." *Id.* at 583. Although the Court assumed that Congress "would have the power to grant immunity to private operators of government vessels for their torts," it found "not the slightest intimation" that Congress intended to make "such a basic change in one of the fundamental laws of agency" by "abolish[ing] all remedies that might exist against a private company for torts committed during its operation of government vessels under [government] agency agreements." *Id.* at 579-581.

Petitioner relies heavily on decisions concerning the *qualified* immunity enjoyed by individuals who perform services for the government and are sued for alleged wrongs they have committed while serving in that capacity. See Pet. Br. 36-39 (repeatedly citing, *e.g.*, *Filarsky* v. *Delia*, 132 S. Ct. 1657 (2012)). Petitioner identifies no decision of this Court holding that a corporation (as distinct from an individual) is entitled to qualified immunity. And the existence of the qualified-immunity doctrine as a separate limit on potential liability simply underscores that persons who act on the government's behalf do not automatically share the government's own immunity from suit. The Court's qualified-immunity jurisprudence therefore provides no support for petitioner's proposed general rule that government contractors are entitled to "derivative sovereign immunity."[9]

3. Petitioner principally relies (Br. 35, 37-41) on *Yearsley* v. *W.A. Ross Construction Co.*, 309 U.S. 18 (1940). Petitioner's reliance on that decision is misplaced. The Court in *Yearsley* did not confer derivative immunity on a government contractor, but rather recognized that the government could lawfully authorize its contractor to take actions that the government itself could lawfully take.

In *Yearsley*, the government contracted with a construction company to redirect the Missouri River as specified in the contract, which resulted in the erosion of

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[9] Even assuming *arguendo* that private corporate entities could be entitled to qualified immunity in some circumstances, the question of qualified immunity is not before this Court. The courts below did not resolve any claim to such immunity, and petitioner did not seek review on a qualified-immunity question, Pet. i, let alone demonstrate that it meets the distinct requirements of a qualified-immunity claim.

about 95 acres of the Yearsleys' land. 309 U.S at 19-20. The Yearsleys' land "was intended to be washed away as a necessary part of the federal project" because the project required it to be "washed away to a point predetermined by the Government" under the contract's "detailed specifications." U.S. Amicus Br. at 5-6, *Yearsley*, *supra* (No. 39-156); see Pet. Br. at 6, 21, *Yearsley*, *supra*. The contractor's work washing away the Yearsleys' land thus "was all authorized and directed by the Government." 309 U.S. at 20.

The Yearsleys sued the contractor, but this Court held that the contractor could not be held liable for eroding their land. Although the Court assumed that the actions authorized by the government would constitute a "taking" of property, it concluded that such actions were "within [the government's] constitutional power" because the government by statute had "impliedly promised to pay [just] compensation." *Yearsley*, 309 U.S. at 21-22; see, *e.g.*, *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."). The Court further held that, because the government could lawfully take the Yearsleys' property, it could "validly confer[]" on its contractor the authority to do so. 309 U.S. at 22. The court explained that "no ground [existed] for holding [a government] agent liable who is simply acting under the authority thus validly conferred" because, in such circumstances, "[t]he action of the agent is 'the act of the government.'" *Ibid.* (citation omitted).

Although the Court in *Yearsley* did not discuss the distinction between "privileges" and "immunities," the Court held that the government had "validly conferred"

on the contractor the government's own lawful authority to take the Yearsleys' land. At common law, "[a]n agent is privileged to do what otherwise would constitute a tort if his principal [1] is privileged [2] to have an agent do it and [3] has authorized the agent to do it." 2 Restatement (Second) of Agency § 345, at 108; see 1 *id.* § 17 & cmts. a-b, at 85-86 (delegable privileges); 2 *id.* § 347, at 110 (no immunity).[10] Thus, if the United States possesses a privilege to take an action that others could not lawfully take, and if that privilege is not a "personal" (*i.e.*, non-delegable) one, a contractor may perform the action on the government's behalf if the government so directs. The contractor in such circumstances is insulated from liability, not because it possesses an "immunity" from suit, but because its conduct is *lawful*.[11]

That understanding of *Yearsley* is consistent with the Court's approach to the preemption of state-law tort claims against a contractor in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988). The Court in *Boyle* held

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[10] If the principal does not authorize the agent's action in advance but later ratifies it, that ratification will also release the agent from liability to a third party if the agent's actions would have been lawful if authorized. 2 Restatement (Second) of Agency § 360 & illus. 2, at 135-136.

[11] In *Brady*, the Court cited *Yearsley* as reflecting that "government contractors obtain certain immunity" when performing work under government contracts. 317 U.S. at 583. The Court in *Brady* also observed, however, that in *Yearsley* the government had "validly conferred" authority to take the actions at issue. *Ibid.* (citation omitted). *Brady*'s passing use of the term "immunity" thus appears to reflect a more colloquial use of the term. Cf. 2 Restatement (Third) of Agency § 7.01, at 136 (2006) (noting that courts sometimes "use 'immunity' language interchangeably with 'privilege' in the context of an agent's individual liability for tortious interference").

that state-law design-defect claims involving military equipment are preempted "when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 512.

Boyle teaches that certain state-law claims against contractors are preempted when allowing those claims "would produce the same effect sought to be avoided" by the FTCA's exception for "discretionary functions." 487 U.S. at 511. The Court in *Boyle* did not hold or suggest, however, that the application of state tort law to federal contractors is *categorically* preempted. Rather, the prerequisites to *Boyle* preemption described above ensure that the United States has actually authorized its contractor to take the allegedly tortious action with full knowledge of its potentially harmful effects. Similarly with respect to federal statutory prohibitions, requiring governmental authorization to engage in conduct that would be unlawful absent a delegation of the government's privilege facilitates the government's ability to balance the need for such action against the countervailing policies that animate the general prohibition.[12]

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[12] Petitioner relies in part (Br. 41, 47, 49-50) on the United States' petition-stage brief in *KBR, Inc* v. *Metzgar*, 135 S. Ct. 1153 (2015) (denying certiorari). That brief addressed the circumstances in which a state-law tort claim will be preempted by principles drawn from the FTCA's "combatant activities" exception, which preserves the sovereign immunity of the United States from claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. 2680(j). The government argued that, in circumstances where "a similar claim against the United States would be within the FTCA's combatant-activities exception," a claim against the government's

4. In any particular case, the determinations whether the government has a privilege to act, whether that privilege is delegable, and whether the government has authorized an agent to perform a particular act that "otherwise would constitute a tort" will turn on an analysis of the relevant statutory or constitutional context in light of background agency principles. The FCC is currently considering requests to clarify that a federal agency (*e.g.*, the Census Bureau) may utilize private contractors to make calls on behalf of the agency, even in circumstances where similar calls would violate the TCPA if they were made on behalf of a private entity. See FCC, Public Notice, 29 FCC Rcd. 13,916, 13,916-13,917 (2014); FCC, Public Notice, 29 FCC Rcd. 11,268, 11,268 (2014). But regardless of whether and under what circumstances a federal agency may delegate its privilege to make such calls lawfully under the TCPA, petitioner could not invoke such a privilege here because the Navy never authorized petitioner to send text messages to unconsenting individuals.

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contractor should ordinarily be preempted "as long as the alleged conduct at issue was within the general scope of the contractual relationship between the contractor and the federal government." U.S. Cert. Amicus Br. at 15-16, *KBR*, *supra* (No. 13-1241). The government's position in that case rested on the broad text of the combatant-activities exception and on the ground that the "military's effectiveness would be degraded if its contractors were subject to the tort law of multiple States for actions occurring in the course of performing their contractual duties arising out of combat operations." *Id.* at 14. That brief reflects the government's view that the protections afforded to federal contractors depend in part on the nature of the services they perform and the government interests involved; it does not support the categorical rule of "derivative sovereign immunity" that petitioner advocates.

The summary-judgment evidence, which at this stage of the case must be construed in the light most favorable to respondent, indicates that petitioner agreed "to send [the] messages only to cellular users that had consented to solicitation," and that petitioner "was not authorized to send texts to individuals who had not opted in." Pet. App. 2a, 4a. As explained above, the ability of an agent to invoke a privilege held by its principal depends on, *inter alia*, the principal's decision to delegate its own authority to act. Although the Navy could lawfully have sent recruiting text messages to respondent and other unconsenting recipients, the record does not suggest that it delegated that privilege to petitioner. Thus, even if petitioner had argued that its own conduct was lawful, rather than attempting to invoke the United States' immunity from suit, its argument would lack merit under the circumstances of this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of approximately 12 million working men and women.[1] The AFL-CIO submits this brief to address the first question presented by this case: "Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim." Pet. Br. i. That is the same question that was presented, but not decided, in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), which involved a Rule 68 offer of judgment made in the context of a suit for unpaid overtime under the Fair Labor Standards Act (FLSA). Although this case involves a federal statute regarding unsolicited telephone calls and text messages, rather than unpaid wages and overtime, the mootness question presented is the same. As we explained in our brief in *Genesis Healthcare*, the AFL-CIO has a strong interest in the correct understanding of Article III's case and controversy requirement as it bears on effective enforcement of basic workplace

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[1] Counsel for the petitioner and counsel for the respondent have filed letters with the Court consenting to the filing of *amicus* briefs on either side. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

rights because Rule 68 offers of judgment are commonplace in suits brought under the FLSA and other labor and employment laws.

STATEMENT

Campbell-Ewald Company, which is engaged in the business of providing marketing consulting services, entered into a contract with the U.S. Navy to develop and implement a multimedia recruitment campaign that included sending text messages to the cell phones of targeted individuals between the ages of 18 and 24 who consented to receive such messages. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 873 (9th Cir. 2014). Acting through a third-party vendor, Campbell-Ewald sent one such Navy recruitment text message to Jose Gomez. *Ibid.* Gomez, who was 40 years old at the time, was not within the targeted age range of the Navy's recruitment campaign and did not consent to receive text messages from the Navy. *Id.* at 874. Gomez filed this class-action lawsuit against Campbell-Ewald under a provision of the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227, which makes certain text messages unlawful absent "the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(B).

Campbell-Ewald extended a Rule 68 offer of judgment in the amount of $1,503 per violation plus costs to Gomez, as well as a traditional settlement offer for the same amount. *Gomez v. Campbell-Ewald Co.*, 805 F. Supp. 2d 923, 926 (C.D. Cal. 2011). Gomez did not accept either offer and, by its express terms, the Rule 68 offer of judgment expired after fourteen days. *Gomez*, 768 F.3d at 874. Campbell-Ewald then moved to dismiss the case under Rule 12(b)(1), contending

that the Rule 68 offer of judgment and settlement offer for complete relief mooted Gomez's case. *Ibid.*

Focusing largely on the class action rather than Gomez's individual claim, the district court nevertheless held that neither the unaccepted Rule 68 offer nor the unaccepted settlement offer mooted Gomez's claim. *Gomez*, 805 F. Supp. 2d at 931. Campbell-Ewald appealed and the court of appeals reached the same conclusion, relying on recent circuit precedent to hold that "an unaccepted Rule 68 offer of judgment that would fully satisfy a plaintiff's claim is insufficient to render the claim moot." *Gomez*, 768 F.3d at 875 (quoting *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 950 (9th Cir. 2013)). Defendant then filed a petition for a writ of certiorari, which this Court granted.

SUMMARY OF ARGUMENT

A defendant's tender of complete relief to a plaintiff can moot a plaintiff's claim. A tender requires the defendant to actually provide money to the plaintiff or deposit money with the court in the plaintiff's name without condition or stipulation. A tender is thus an irrevocable transfer of title to funds from the defendant to the plaintiff made without regard to the outcome of the lawsuit and without requiring any reciprocal action by the plaintiff. If the amount of the tender is sufficient to satisfy any claim the plaintiff could make for relief, the plaintiff is left without any concrete interest in the litigation and the case is moot.

In contrast, a defendant's offer of complete relief – whether made pursuant to Rule 68 or as a traditional settlement offer – has no bearing on mootness if it is not accepted by the plaintiff. An unaccepted offer is

a nullity, leaving the plaintiff in the same position as before the offer was made. Nothing in Rule 68 changes this basic principle of contract law. To the contrary, Rule 68 states on its face that an offer of judgment that is not accepted within 14 days is considered withdrawn and that evidence of an unaccepted offer is inadmissible except for determining costs. The only effect of an unaccepted offer made pursuant to Rule 68, then, is to shift responsibility for post-offer costs from the defendant to the plaintiff if the plaintiff prevails in her claim but recovers less than the unaccepted offer.

Campbell-Ewald repeatedly claims in its brief that both its Rule 68 offer of judgment and its settlement offer constituted tenders, but it is clear from the facts presented that this is not correct. Campbell-Ewald never provided Gomez with the money it offered or deposited that money with the court in Gomez's name. And, Campbell-Ewald conditioned both of its offers upon Gomez's acceptance of the money offered in full satisfaction of his claim. Neither offer, therefore, met the basic elements of a tender.

Campbell-Ewald could have sought to moot Gomez's claim by actually tendering him the money it offered him or, in the alternative, by consenting to the district court entering a default judgment against the company. But because Campbell-Ewald did not take either of these steps, and because Gomez declined to accept both Campbell-Ewald's Rule 68 offer of judgment and settlement offer, this case is not moot.

ARGUMENT

As we explain in detail below, the answer to the first question presented by this case – "Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim[,]" Pet. Br. i – is "no." An "*offer* of complete relief," *ibid.* (emphasis added), made pursuant to Rule 68 of the Federal Rules of Civil Procedure or simply as part of a routine attempt to settle a case, does not moot a plaintiff's claim unless it is accepted. For Article III purposes, an unaccepted offer changes nothing with regard to the plaintiff's interest in the case; the same live controversy that existed before the offer was made persists after the offer is declined or withdrawn.

In contrast, a tender of complete relief – which involves the defendant's unconditional proffer of money to the plaintiff or deposit of that money with the court – *can* moot the plaintiff's case. Campbell-Ewald characterizes the Rule 68 offer of judgment and the settlement offer it made to Gomez as "tenders." But the facts of this case make clear that the company's offers did not involve "tenders" of the sort that can moot a claim because the offers did not include the proffer of money and were not unconditional. Campbell-Ewald's offers, therefore, were not tenders of complete relief and, consequently, Gomez's case is not moot.

I. A TENDER OF COMPLETE RELIEF CAN MOOT A PLAINTIFF'S CASE, BUT NEITHER CAMPBELL-EWALD'S RULE 68 OFFER OF JUDGMENT NOR ITS SETTLEMENT OFFER WAS A TENDER.

Campbell-Ewald repeatedly characterizes its Rule 68 offer of judgment and settlement offer as "tenders," rather than unaccepted offers, and argues that they mooted Gomez's claim. As we explain below, Campbell-Ewald is correct that a tender for complete relief, unlike an unaccepted Rule 68 offer or unaccepted settlement offer, could render a plaintiff's case moot. But Campbell-Ewald did not tender any relief to Gomez in this case. As a result, Campbell-Ewald's arguments regarding tender simply do not apply here.

A. A tender is "[t]he act by which one produces and offers to a person holding a claim or demand against him the amount of money which he considers and admits to be due, in satisfaction of such claim or demand, without any stipulation or condition." BLACK'S LAW DICTIONARY 1467 (6th ed. 1990). *See also* 28 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 72:27 (4th ed. 2003) ("'[T]ender' is an unconditional offer of payment consisting of the actual production of a sum not less than the amount due on a particular obligation[.]"). "[T]he principle of the plea of tender is that the defendant has always been ready to perform the contract, and that he did perform it as far as he was able by tendering the requisite money[.]" *Colby v. Reed*, 99 U.S. 560, 561 (1879). The two essential elements of a tender, therefore, are "[t]he actual proffer of money, as distinguished from [the] mere proposal or proposition to proffer it," and that

the proffer be unconditional, "without any stipulation or condition." BLACK'S LAW DICTIONARY 1467.

As to the first element, it is black-letter law that "[t]o constitute a valid tender the money must be actually produced and offered to the person who is entitled to receive it." *Mondello v. Hanover Trust Co.*, 148 N.E. 136, 137 (Mass. 1925). *See also ibid.* (collecting state supreme court cases holding same). "A mere offer to pay or a statement that the party has the money and is ready and willing to pay, without actual production of it, is not sufficient to constitute a valid tender." *Ibid.* "[P]roduction of [the] subject matter of [the] tender" is, therefore, an "essential characteristic[] of tender." BLACK'S LAW DICTIONARY 1467 (citing *Collins v. Kingsberry Homes Corp.*, 243 F. Supp. 741, 744 (N.D. Ala. 1963)).

In *Peugh v. Davis*, 113 U.S. 542 (1885), this Court confirmed the requirement that, to constitute a tender, a defendant must "actually produce[] and offer[]" the money owed "to the person who is entitled to receive it." *Mondello*, 148 N.E. at 137. *Peugh* involved a dispute in which Peugh, who had conveyed the use of certain lots of land to Davis in exchange for a loan, sought to have the interest on the loan set aside on the ground that Davis had refused an offer of repayment. In rejecting Peugh's request to set aside the interest, the Court explained,

> "The short answer to all this is, that Mr. Peugh owed the money he had borrowed from Davis. Nothing hindered during all this time that he should pay this money; and if, as he alleges, Davis denied his right to do so, then he should have made a regular and lawful tender of the amount due.

> "A lame attempt is made to show that he did make this tender. Some evidence is offered that he told Davis he was ready to account with him and pay what was due, and that he had the money with him.
>
> "But in order to make a tender that would have caused the interest to cease, he should have ascertained for himself the sum due, or have fixed upon a sum which was sufficient, and then made a formal tender by counting out or offering that sum to Davis distinctly and directly as a tender." *Peugh*, 113 U.S. at 544-45.

What is clear from *Peugh*, then, is that it is not a tender when a defendant "t[ells] [the plaintiff] he [i]s ready to account with him and pay what [i]s due, and that he ha[s] the money with him." *Ibid.* That is a mere offer. To constitute a tender, the defendant must "count[] out or offer[] that sum to [the plaintiff] distinctly and directly." *Ibid.*

The second element of a tender is that the "tender of money . . . must be unconditional." 13 CORBIN ON CONTRACTS § 67.7(6) (Joseph M. Perillo ed., rev. ed. 2003). For example, "a condition that a payment shall be taken in full discharge or as a compromise of the debtor's obligation . . . invalidates the tender." 28 WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 72.39. To constitute a tender, the defendant must provide payment to the plaintiff unilaterally, without stipulations, conditions, or demands for reciprocal action from the plaintiff in exchange for the payment. At bottom, then, a tender involves "simply writing [the plaintiff] a check, with no strings attached." *Poteete v. Capital Engineering, Inc.*, 185 F.3d 804, 807 (7th Cir. 1999). Thus, where a defendant "condition[s] [its] offer to pay [the plaintiff] on his

surrendering his other claims," "[t]hat is . . . an offer of settlement," not a tender. *Ibid.*

A tender, properly made, may render the plaintiff's claim moot. However, because a tender is by definition unconditional, a "tender cause[s] the [plaintiff's] interest to cease" only when it is equivalent to the entire "amount due" to the plaintiff. *Peugh*, 113 U.S. at 544-45. In that regard, it is important to emphasize that, in the event the tender is "made after [the] action [is] brought," complete relief of the sort that would moot a plaintiff's claim "must include the costs to that time as well as the debt." *Colby*, 99 U.S. at 565. *Cf. California v. San Pablo and Tulare R.R. Co.*, 149 U.S. 308, 313 (1893) (defendant's payment of "the sums sued for in this case, together with interest, penalties and costs, extinguished" "[a]ny obligation of the defendant to pay the State"). So, for example, a tender that includes the amount of the plaintiff's claim but not the attorney's fees and costs to which the plaintiff is statutorily entitled if she prevails is insufficient to require dismissal of the plaintiff's suit. *Barron Chiropractic & Rehabilitation, P.C. v. Norfolk & Dedham Group*, 17 N.E.3d 1056, 1064 (Mass. 2014).

Where a plaintiff refuses a tender despite the fact that it provides her with complete relief, the proper course is for the defendant to make "payment of the money into court," *Colby*, 99 U.S. at 565, as permitted by Rule 67 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2041. *See* 12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2991 (3rd ed. 2014) (explaining that Rule 67 "is useful in cases of tender of an undisputed sum."). Such a deposit, after the plaintiff has refused the tender, has the same effect as the defendant's tender to

the plaintiff herself. *See, e.g., Rothe Development Corp. v. Department of Defense*, 413 F.3d 1327, 1331-32 (Fed. Cir. 2005) (to constitute "a valid tender" defendant must either "provid[e] [the plaintiff] with a check or deposit[] such a check with the court"); *Riley-Stabler Constr. Co. v. Westinghouse Electric Corp.*, 396 F.2d 274, 278 (5th Cir. 1968) (stating same). That is so because a "payment into court in support of a prior tender" "constitute[s] a final irrevocable transfer of title to the fund by the party making the tender, regardless of the outcome of the action and irrespective of any acceptance by the party to whom a tender is made." WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 72:44.

B. In this case, Campbell-Ewald refers throughout its brief to its Rule 68 offer of judgment and settlement offer as "tenders." *See, e.g.*, Pet. Br. 11 ("Campbell-Ewald made its tender of complete relief before any class was certified"); *id.* at 25 ("defendant had already tendered Plaintiff all the relief he could possibly secure through this action"). *See also* Pet. Br. 2, 6, 19, 20, 20 n. 5. That is simply not an accurate characterization. Neither offer meets the essential elements of a tender.

In both its Rule 68 offer of judgment and its settlement offer, Campbell-Ewald *offered* to pay Gomez $1,503 and costs. *Gomez v. Campbell-Ewald Co.*, 2:10-cv-02007 (C.D. Cal.), docket entry 31 (Rule 68 offer of judgement) & docket entry 49, exhibit 5 (settlement offer). But Campbell-Ewald never tendered any money to Gomez or deposited any money with the district court in Gomez's name. Indeed, as Campbell-Ewald acknowledges, "[t]he offers made explicit that Campbell-Ewald would '*arrange* for prompt payment[,]'" Pet. Br. 7 (quoting settlement offer, p. 2) (emphasis added), they

did not *include* payment. Neither offer, therefore, met the basic requirement of a tender that "the money be actually produced and offered to the person who is entitled to receive it." *Mondello*, 148 N.E. at 137.

Both of Campbell-Ewald's offers also conditioned payment upon Gomez's acceptance of the offered amount in full satisfaction of his claim and his agreement to terminate the lawsuit. The Rule 68 offer specified that "[t]his offer shall be deemed withdrawn unless written notice of acceptance is received within fourteen days of service," and made clear that it was "intended to fully satisfy the individual claims of Gomez asserted in this action or which could have been asserted in this action." *Gomez*, 2:10-cv-02007 at docket entry 31 ¶ 6-7. Similarly, the settlement offer explicitly conditioned "prompt payment" of the promised funds on Gomez's acceptance and stated that "[t]he offers extended in this letter are intended to fully satisfy the individual claims of Mr. Gomez or which could have been made in his suit." *Id.* at docket entry 49, exhibit 5, p. 2. Because they were conditional, both of Campbell-Ewald's offers constituted "offer[s] of settlement," *Poteete*, 185 F.3d at 807, rather than tenders.

In light of these facts, it is passing strange that, in its brief, Campbell-Ewald relies heavily on this Court's decision in *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308 (1893), as support for its claim that its unaccepted Rule 68 offer of judgment and unaccepted settlement offer mooted Gomez's claim. Campbell-Ewald correctly states that *San Pablo* stands for the proposition that "a defendant's tender of the relief sought eliminates an Article III controversy." Pet. Br. 16. But the facts of *San Pablo*, as de-

scribed by Campbell-Ewald in its brief, make clear that neither of Campbell-Ewald's offers to Gomez were tenders.

San Pablo involved a suit by the State of California against a railroad company to recover unpaid taxes. 149 U.S. at 308. As Campbell-Ewald correctly observes, "[w]hile the case was pending, 'the defendant offered *and tendered* to the plaintiff a sum of money equal to the taxes, penalties, interest, and attorney's fee, to recover which this action was brought, and costs of suit.'" Pet. Br. 17 (quoting *San Pablo*, 149 U.S. at 311-12) (emphasis added). After California rejected the railroad's tender, the railroad "deposit[ed] the money in a bank, which by a statute of the State ha[d] the same effect as actual payment and receipt of the money." *San Pablo*, 149 U.S. at 314.[2] Based on that deposit, which functioned as a tender by operation of state law, this Court held that "[a]ny obligation of the defendant to pay to the State the sums sued for in this case, together with interest, penalties and costs, has been extinguished." *Id.* at 313.

In strong contrast, in this case, Campbell-Ewald never "tendered to the plaintiff" any money at all, *id.* at 311, or deposited the money it admitted it owed to Gomez with the district court. Therefore, unlike in *San Pablo*, Campbell-Ewald did not tender Gomez

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[2] Section 1500 of the Civil Code of California at the time stated: "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this State of good repute, and notice thereof is given to the creditor." *San Pablo*, 149 U.S. at 312.

complete relief and "[a]ny obligation of the defendant to pay to the [plaintiff] the sums sued for in this case," most certainly was *not* "extinguished," *id.* at 313, by either Campbell-Ewald's Rule 68 offer of judgment or settlement offer.

II. FOR MOOTNESS PURPOSES, AN UNACCEPTED RULE 68 OFFER OF JUDGMENT OR UNACCEPTED SETTLEMENT OFFER LEAVES THE PLAINTIFF IN THE SAME POSITION AS BEFORE THE OFFER WAS MADE.

"A case becomes moot only when it is impossible for a court to grant 'any effectual relief whatever to the prevailing party.' As long as the parties have a concrete interest, however, small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Employees Int'l Union*, 132 S. Ct. 2277, 2287 (2012) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)). Because an unaccepted Rule 68 offer leaves the plaintiff in the same position as before the offer was made – other than the possibility of costs being shifted to the plaintiff – an unaccepted Rule 68 offer has no effect on whether the plaintiff retains a "concrete interest in the outcome of the litigation." *Ibid.*

By its terms, the plain language of Rule 68 makes clear that an unaccepted offer of judgment does not permit the district court to enter judgment in the case, but rather such an offer expires by its own terms and, thereafter, is a nullity. The Rule permits a defendant to "offer to allow judgment on specified terms, with the costs then accrued." FED. R. CIV. P. 68(a). If the plaintiff "serves written notice accepting the offer"

within 14 days, "either party may then file the offer and notice of acceptance" with the court and "[t]he clerk must then enter judgment." *Ibid.* If the plaintiff declines to accept the offer – or if the plaintiff simply takes no action "within 14 days after being served" – the "unaccepted offer is considered withdrawn." FED. R. CIV. P. 68(a) & (b).

There is no ambiguity in the Rule. Nothing in Rule 68's text states or suggests that a district court may enter judgment based on an unaccepted offer. And, this Court has previously stated that, in interpreting Rule 68, the Court should "limit [its] analysis to the text of the Rule itself." *Delta Air Lines v. August*, 450 U.S. 346, 348, 352 (1981) (construing the words "judgment finally obtained by the offeree" in an earlier version of Rule 68 as "appl[ying] only to judgments obtained by the plaintiff," not to judgments obtained by a defendant who makes a Rule 68 offer). Indeed, the language of the Rule is so clear that Campbell-Ewald *does not even cite Rule 68 or discuss the Rule's text in its brief, see* Pet. Br. xiii (Table of Authorities); *id.* 13-22 (Argument), much less attempt to offer an alternative interpretation of the Rule's meaning.

The text of Rule 68 also makes clear that the sole effect of a plaintiff's decision to decline a Rule 68 offer of judgment is that "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." FED. R. CIV. P. 68(d). As this Court has explained, "[i]f a plaintiff chooses to reject a reasonable [Rule 68] offer," "he [is] not [] allowed to shift the cost of continuing the litigation to the defendant in the event that his gamble produces

an award that is less than or equal to the amount offered." *Delta Air Lines*, 450 U.S. at 356. But nothing in *Delta Air Lines* or this Court's other precedent suggests that a court can prohibit a plaintiff from rejecting a Rule 68 offer of judgment, even if it constitutes "a reasonable offer." *Ibid.*

This reading of the Rule 68's operative effect as limited to "'sav[ing]' a defendant from having to reimburse the plaintiff for costs incurred after the offer was made," *id.* at 360, is further confirmed by the Rule's provision stating that "[e]vidence of an unaccepted offer is not admissible," except for the limited purpose of "a proceeding to determine costs." FED. R. CIV. P. 68(b). This provision – which generally accords with the evidentiary rule that "offer[s] [of] valuable consideration to compromise [a] claim" are inadmissible with regard to a determination of the merits, FED. R. OF EVID. 408 – strongly suggests that the limited purpose of the Rule is "to *encourage* the settlement of litigation," *Delta Air Lines*, 450 U.S. at 352 & n.8 (citing Advisory Committee's Notes on FED. R. CIV. P. 68, 28 U.S.C. App., p. 499) (emphasis added), *not* to allow a defendant to forcibly moot a plaintiff's case. Thus, because "[e]vidence of an unaccepted offer is not admissible," FED. R. CIV. P. 68(b), a defendant may no more rely on an unaccepted Rule 68 offer of judgment as a basis to seek dismissal of a plaintiff's case than it could rely on an unaccepted settlement offer for that same purpose.

In this case, Campbell-Ewald relied on its unaccepted Rule 68 offer of judgment and unaccepted settlement offer as the ground for its motion to dismiss Gomez's suit for lack of jurisdiction. *Gomez*, 2:10-cv-

02007, docket entry 46 (Def's Memo. in Support of Motion to Dismiss for Lack of Jurisdiction). The court of appeals correctly rejected that argument on the basis that because "'[a]n unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot[,]'" *Gomez*, 768 F.3d at 875 (quoting *Diaz*, 732 F.3d at 950), this case still presents a live controversy.

III. A DEFENDANT WHO WISHES TO MOOT A PLAINTIFF'S CLAIM CAN EITHER UNCONDITIONALLY TENDER COMPLETE RELIEF OR CONSENT TO A DEFAULT JUDGMENT.

Although an unaccepted Rule 68 offer of judgment or unaccepted settlement offer is insufficient to moot a plaintiff's claim, a defendant who wishes to avoid the risks and expenses associated with continued litigation by making the plaintiff whole still has ample means to do so.

First, as we have already described, a defendant can moot a plaintiff's claim by making an unconditional tender of complete relief. *See supra* Section I. In this case, Campbell-Ewald could have sought to moot Gomez's claim by unconditionally tendering Gomez a check for $1,503 or by depositing a check for that amount with the district court. Whether or not Gomez accepted the tender, Campbell-Ewald could move under Federal Rule of Civil Procedure 12(b)(1) to dismiss Gomez's claim on the basis that Gomez no longer had any "concrete interest . in the outcome of the litigation," *Knox*, 132 S. Ct. at 2287, such that his claim was moot. The court would then have had to determine, as a factual matter, whether "[a]ny obligation of the defendant to pay to [the plaintiff] the

sums sued for , together with interest, penalties and costs, has been extinguished" such that "the cause of action has ceased to exist." *San Pablo*, 149 U.S. at 313.

Alternatively, as Campbell-Ewald acknowledges, "'[i]t is always open to a defendant to default and suffer judgment to be entered against him without his admitting anything – if he wants, without even appearing in the case.'" Pet. Br. 24 (quoting *Chathas v. Local 134 IBEW*, 233 F.3d 508, 512 (7th Cir. 2000)). Like a tender that fully satisfies the plaintiff's claims, where "the defendant has thrown in the towel there is nothing left for the district court to do except enter judgment." *Chathas*, 233 F.3d at 512. *Accord McCauley v. Trans Union, LLC*, 402 F.3d 340, 342 (2d Cir. 2005) (stating that a default judgment "would remove any live controversy from th[e] case and render it moot"). Notably, a default judgment does not ordinarily have issue-preclusive effect in similar future cases against the defendant by other plaintiffs because the merits have not been "'actually litigated and determined.'" *Arizona v. California*, 530 U.S. 392, 414 (2000) (quoting 1 RESTATEMENT (SECOND) OF JUDGMENTS § 27, at 250 (1982)). *See also* 1 RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e, at 257 (explaining that, "[i]n the case of a judgment entered by default," issue preclusion does not apply absent an agreement to the contrary).

Campbell-Ewald suggests that "an offer of complete relief puts the plaintiff in a far better position than a default" because "[i]t grants him all the relief he seeks without having to worry about spending time and resources chasing after a defendant that has de-

faulted in order to secure any meaningful relief at all." Pet. Br. 24. Even assuming this is true – and there are countervailing considerations since when a default judgment is entered, unlike a Rule 68 offer, the extent of damages is determined at the plaintiff's initiative, *see* FED. R. CIV. P. 55(b) – Campbell-Ewald's suggestion has no bearing on Article III mootness. A default *judgment* is a final judgment on the merits that ends the case, whereas a Rule 68 *offer* remains just that – an offer that only has effect if it is accepted by the plaintiff within the time period and in the manner set forth in the Rule.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim.

2. Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified.

3. Whether the doctrine of derivative sovereign immunity recognized in *Yearsley* v. *W.A. Ross Construction Co.*, 309 U.S. 18 (1940), for government contractors is restricted to claims arising out of property damage caused by public works projects.

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae the Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing 300,000 direct members and representing indirectly the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States. An important function of the Chamber is to represent the interests of its members by participating as *amicus curiae* in cases involving issues of national concern to American business, including cases raising significant questions for companies subject to potential class actions and collective actions. *See, e.g.*, *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1528 (2013) (addressing the effect of an unaccepted Rule 68 offer on an FLSA collective action where Chamber submitted petition- and merits-stage *amicus* briefs); *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011) (addressing standard for class certification in case where Chamber submitted petition- and merits-stage *amicus* briefs).

The Business Roundtable ("BRT") is an association of chief executive officers of leading U.S. companies that together have $7.2 trillion in annual revenues and nearly 16 million employees. BRT member

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[1] Pursuant to this Court's Rule 37.3(a), both parties submitted letters to the Clerk granting blanket consent to *amicus curiae* briefs. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

companies comprise more than a quarter of the total value of the U.S. stock market and pay more than $230 billion in dividends to shareholders. The BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy, and participate in litigation as *amici curiae* where, as here, significant business interests are at stake.

The Chamber and BRT are committed to filing briefs in important cases that offer opportunities for this Court to clarify the law and thus help facilitate their members' compliance with it, including with the statute at issue here, the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Many of the nation's businesses dedicate significant time, energy, and resources to achieve such compliance. These efforts are undermined by the burdens and expenses of defending private lawsuits prosecuted not by plaintiffs with a personal stake in the outcome as required by Article III, but by lawyers in search of attorneys' fees. The Ninth Circuit in this case, in direct contravention of this Court's Article III jurisprudence, sanctioned exactly such lawyer-driven suits by holding, in conflict with several other circuits, that putative class actions may continue even though the defendants have offered the only named plaintiff complete relief and no other person has affirmatively joined the suit. *Amici* submit this brief to explain why the Ninth Circuit's decision should be reversed.

SUMMARY OF ARGUMENT

This case presents the important question whether class action lawsuits may proceed even after a full settlement offer has mooted the only named plaintiff's claim. Such "headless" class actions can-

not be squared with Article III, Rule 23, due process, and fundamental principles of legal ethics.

Allowing such class actions to proliferate harms defendants and the judicial system alike, because it encourages lawsuits and discourages settlements. It especially harms plaintiffs, who may succumb to pressure to reject full settlement offers—thereby assuming liability for Rule 68 costs at the conclusion of the case—all so that putative class counsel can pursue the lawsuit on a classwide basis in hopes of obtaining substantial legal fees.

Reversal of the Ninth Circuit's decision is warranted for several reasons:

First, a full settlement offer extinguishes any controversy between the parties, and thus eliminates federal jurisdiction under Article III's case or controversy requirement. A number of important prudential considerations—including promoting judicial economy, preserving institutional credibility, and ensuring a sharp and vigorous presentation of the issues—reinforce that conclusion. A plaintiff's subjective desire to continue litigating is irrelevant, and indeed, this Court has repeatedly dismissed actions as moot after the defendant unilaterally took some action that effectively eliminated the parties' controversy. Petitioner's tender of full relief in this case is no different.

Second, Article III compels the same result whether or not the plaintiff has included class allegations in his complaint. Allowing a putative class action to continue when there is no live controversy between the named plaintiff and the defendant also harms plaintiffs and invites gamesmanship. It allows putative class counsel to maintain federal law-

suits for their own financial benefit—even where their only client stands to gain nothing, but potentially to lose much, by rejecting a full settlement offer.

Third, the rule adopted by the Ninth Circuit below does violence to Rule 23(a)(4)'s adequacy requirement, which requires that "the representative parties will fairly and adequately protect the interests of the class," by driving a wedge between the interests of putative class counsel and the named class representatives. It does so by incentivizing lawyers to encourage their clients *not* to accept full settlement offers and to assume the hefty risks of litigating in the face of a Rule 68 offer simply to keep putative class actions alive. And it effectively guts the commonality and typicality requirements of Rule 23(a)(2) and (a)(3), because a named plaintiff with a moot claim cannot "'possess the *same interest* and suffer the same injury' as the class members." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 625–26 (1997) (emphasis added); *see also Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011).

Fourth, while the scope of Article III does not turn on legislative policy goals, a rule that a full settlement offer moots a class action is consistent with the policy considerations animating the applicable statutes. This is particularly true in the context of statutes with reticulated damages provisions such as the TCPA, which contemplates that a defendant will pay statutory damages only to the handful of plaintiffs who feel aggrieved enough to sue over an errant telemarketing phone call or text message, and not be subjected to potentially ruinous liability to hundreds of thousands of unnamed, absent individuals, who do

not care enough about the alleged violation to request relief for themselves.

ARGUMENT

Amici agree with and fully support Petitioner's arguments in support of reversal on all three questions presented, including on the third question presented regarding sovereign immunity. *Amici* write separately, however, to emphasize and elaborate upon a number of Petitioner's arguments, including its arguments for a clear rule establishing that a complete offer of relief moots a plaintiff's claim, whether or not the plaintiff has asserted class allegations in his complaint.

I. UNDER THIS COURT'S ARTICLE III AND MOOTNESS JURISPRUDENCE, AN OFFER OF COMPLETE RELIEF MOOTS A PLAINTIFF'S CLAIMS

"The inability of the federal judiciary 'to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'" *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974) (per curiam) (citation omitted). When a case has "lost its character as a present, live controversy of the kind that must exist ... to avoid advisory opinions on abstract propositions of law," the court's jurisdiction is extinguished. *Cnty. of Los Angeles* v. *Davis*, 440 U.S. 625, 633 (1979) (internal quotation marks omitted). Likewise, a plaintiff may invoke federal-court jurisdiction only if he possesses a legally cognizable interest, or "personal stake," in the outcome of the action. *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1528 (2013) (internal quotation marks omitted). This personal stake must "be

extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks omitted); *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2661 (2013) ("Article III demands that an actual controversy persist throughout all stage of litigation.") (internal quotation marks omitted).

In addition to this foundational case or controversy requirement, a number of important prudential considerations—including promoting judicial economy, preserving institutional credibility, and ensuring a sharp and vigorous presentation of the issues—further counsel in favor of dismissing cases that lack a live controversy between the parties. The mootness doctrine serves a vital "rationing function" for "scarce judicial resources," Don B. Kates, Jr. & William T. Barker, *Mootness In Judicial Proceedings: Toward a Coherent Theory*, 62 Calif. L. Rev. 1385, 1442 (1974), and "[w]hen events ... have eliminated any possibility that the court's order may grant meaningful relief affecting the controversy that precipitated the litigation, ... judicial administration generally calls for[] dismissal of the appeal." *Alton & S. Ry.* v. *Int'l Ass'n of Machinists*, 463 F.2d 872, 877–82 (D.C. Cir. 1972). The litigation of moot claims also threatens the judiciary's institutional credibility and the proper presentation of the issues. A plaintiff who is pursuing a moot claim "purely for spite or personal vindication" is unlikely to present legal issues with the credibility, candor, and vigor that federal courts require. Kates & Barker, *supra*, at 1385–87. In fact, pursuing litigation for its own sake "is an abuse which the courts of justice have always reprehended, and treated as a punishable contempt of court." *Lord* v. *Veazie*, 49 U.S. (8 How.) 251, 255 (1850).

Under both Article III and these significant prudential considerations, a plaintiff's *subjective* belief that he has a live claim and desire to continue litigating are irrelevant. Mootness has always been an *objective* inquiry. *See City of Los Angeles* v. *Lyons*, 461 U.S. 95, 107 n.8 (1983) ("[i]t is the reality of the threat of ... injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions" that unlawful conduct will recur); *see also Coverdell* v. *Dep't of Soc. & Health Servs.*, 834 F.2d 758, 766 (9th Cir. 1987) ("[P]laintiff's [case or controversy] showing must be objective in character...."') (citing *Preiser* v. *Newkirk*, 422 U.S. 395, 402-03 (1975)). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Already, LLC* v. *Nike, Inc.*, 133 S. Ct. 721, 727 (2013) (internal quotation marks omitted); *see also Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 514 (2006) ("[C]ourts ... have an independent obligation to determine whether subject-matter jurisdiction exists....").

Likewise, this Court has never conditioned mootness on the parties' agreement that the claims are moot. In fact, in a variety of contexts, the Court has found claims moot due to the defendant's *unilateral* conduct that effectively eliminated the live controversy, whether or not the defendant's conduct was accepted, affirmed, or acknowledged by the plaintiff.

First, in *California* v. *San Pablo & Tulare R.R. Co.*, 149 U.S. 308 (1893), the defendant offered to the plaintiff, and subsequently deposited, back taxes, penalties, interest, and attorney's fees. Although the plaintiff did not formally accept the defendant's offer,

the Court nevertheless ruled that the offer "extinguished" the state's claim for relief and mooted the case because, through the offer, the state had "obtained everything that it could recover ... by a judgment of this court in its favor." *Id.* at 314.

Second, this Court has held that a defendant's voluntary cessation of challenged conduct moots a claim where there is "no reasonable expectation that the alleged violation will recur." *Davis*, 440 U.S. at 631 (internal quotation marks and alteration omitted). In *Davis*, the defendant city voluntarily stopped using an allegedly discriminatory employment examination, and the Court held that that conduct mooted the controversy between the parties because there was no reasonable expectation of recurrence. *Id.* at 631-34; *see also Radiofone, Inc.* v. *FCC*, 759 F.2d 936, 937 (D.C. Cir. 1985) (Scalia, J.) (litigation moot because defendant "went out of business").

Third, a state or municipality defendant can unilaterally moot a claim by repealing or amending the statute or regulation that precipitated the lawsuit. In *Berry* v. *Davis*, 242 U.S. 468 (1917), for example, the Iowa Legislature mooted a lawsuit by a felon who had been ordered to undergo a vasectomy by repealing the statute that had imposed that requirement. *Id.* at 470; *see also Kremens* v. *Bartley*, 431 U.S. 119 (1977) (amendment to Pennsylvania law on mental institution commitment mooted lawsuit by individuals alleging they had been unlawfully committed and held in violation of an unconstitutional statute).

Fourth, the Court has held that a lawsuit seeking a building permit became moot once the defendant issued the permit. *Brownlow* v. *Schwartz*, 261 U.S. 216 (1923). In so holding, the Court also rejected the plaintiff's effort to manufacture a dispute by

arguing that the case was not moot because the defendant's motive was not pure, declaring that "[t]he motive of the officer, so far as this question is concerned, is quite immaterial[:] We are interested only in the indisputable fact that his action, however induced, has left nothing to litigate." *Id.* at 218.

These decisions make clear that a defendant's unilateral elimination of a live controversy—like Petitioner's Rule 68 and separate settlement offer of complete relief here—is sufficient to moot a claim. This principle reflects a commonsense notion: if a plaintiff can obtain everything she is entitled to without litigation, there is no valid reason for continued litigation. To hold otherwise would permit federal courts to "declare principles or rules of law which cannot affect the matter in issue in the case before [them]," in contravention of Article III and this Court's prudential jurisprudence. *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 594 (1984) (Blackmun, J., dissenting) (internal quotation marks omitted). And, as explained in Part II, those Article III requirements and prudential considerations apply with equal, if not more, force when a plaintiff has added class allegations to his complaint.

II. THE SAME RULE MUST APPLY IN THE CLASS ACTION CONTEXT, BECAUSE PERMITTING PUTATIVE CLASS ACTIONS TO PROCEED WITHOUT AN INTERESTED NAMED PLAINTIFF VIOLATES ARTICLE III AND RULE 23, HARMS PLAINTIFFS, AND INVITES ABUSE AND GAMESMANSHIP

This Court has repeatedly recognized that the more novel and expansive the class action invention, "the greater the likelihood of abuse." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 842 (1999); *Dukes*, 131 S.

Ct. at 2561 (rejecting the Ninth Circuit's "Trial by Formula" as a "novel project" forbidden by the Rules Enabling Act). The Ninth Circuit's most recent invention—permitting putative class actions to continue even when *no named plaintiff has a live controversy*—defies reason and invites precisely the abuse forbidden by Article III, Rule 23, due process, and fundamental principles of legal ethics. It incentivizes putative class counsel to discourage their clients from accepting full settlement offers, forgoing a bird in the hand for one in the bush. And it potentially places the plaintiff on the hook for the defendant's costs if he loses, with no upside if he wins. The Court should reverse and prohibit federal courts from playing hosts to such gamesmanship.

A. The Rule Adopted By The Ninth Circuit Violates Article III, The Rules Enabling Act, And Due Process

The Ninth Circuit below concluded that putative class actions may continue even though the defendants have offered the only named plaintiff complete relief, and no other plaintiff has joined the suit. *See* Pet. App. 5a. That conclusion rests on nothing more than speculation that further discovery and litigation *might* motivate others to join a suit being prosecuted by counsel who no longer represents a client with a personal stake in the outcome of the case. *Id.* at 6a (declining to extend to Rule 23 class actions this Court's holding in *Genesis Healthcare*, 133 S. Ct. at 1532).

Such a rule runs roughshod over Article III, which requires that "an actual controversy ... be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official Eng-*

lish, 520 U.S. at 67 (internal quotation marks omitted). Lawyers may not bring suit without an injured client in the hopes of finding one later, and they likewise cannot maintain a suit after losing an injured client based solely on speculation that they will be able to locate a new plaintiff, not presently before the court, who might have a live dispute with the defendant. *See Genesis Healthcare*, 133 S. Ct. at 1528 ("If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, *the action can no longer proceed and must be dismissed*[.]") (emphasis added) (internal quotation marks omitted). This is because federal courts may resolve only "present case[s] or controvers[ies]," *Lyons*, 461 U.S. at 102, that "affect the rights of litigants *in the case before them*," *Preiser*, 422 U.S. at 401 (emphasis added) (internal quotation marks omitted).

The same rule *must* apply in the class action context. "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997); *see also Carrera* v. *Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) (holding that "[a] defendant in a class action has a due process right to raise individual challenges and defenses"); *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) (similar). Thus, cases presenting no live controversy cannot continue in federal court simply because the complaint contains class allegations—particularly because the absent putative class members are not parties "'to the class-action litigation *before the class is certified.*'" *Standard Fire Ins. Co.* v. *Knowles*, 133 S. Ct. 1345,

1349 (2013) (citation omitted); *see also Smith* v. *Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011) (holding that unnamed putative class members "are not parties to the suit" before certification); *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) (for a plaintiff to have standing under Article III, he "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").

Rule 23 cannot end-run Article III—a bedrock constitutional requirement that must be satisfied "at all stages" of any federal litigation, class actions or otherwise. *Preiser*, 422 U.S. at 401 (internal quotation marks omitted). And allowing cases to continue solely on behalf of absent, unnamed persons would yield precisely the advisory opinions the case or controversy requirement was intended to avoid. It would also turn the rules governing class actions on their head, effectively *exempting* them from Article III's stringent requirements, even though class actions are the "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 131 S. Ct. at 2550 (internal quotation marks omitted); *see also Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (Rule 23 "imposes stringent requirements for certification that in practice exclude most claims").

The potential for abuse under such a regime abounds and warrants reversal by this Court: In this "era of frequent litigation [and] class actions," enforcement of those stringent requirements should be more vigorous, not less. *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1449 (2011); *see also Denney* v. *Deutsche Bank AG*, 443 F.3d 253,

263–64 (2d Cir. 2006) (holding that "no class may be certified that contains members lacking Article III standing"); *Avritt* v. *Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) ("The constitutional requirement of standing is equally applicable to class actions.").

B. Permitting Class Actions To Proceed Without A Single "Interested" Named Plaintiff Undermines Rule 23's Procedural Safeguards And Harms Plaintiffs

Rule 23 "provide[s] 'structural assurance of fair and adequate representation'" for named plaintiffs and absent class members, *Ortiz*, 527 U.S. at 856, protections that grow more vital as class-action practice becomes more "adventuresome," *Amchem*, 521 U.S. at 617 (internal quotation marks omitted).

To that end, the class representative must "be part of the class and 'possess the *same interest* and suffer the same injury' as the class members." *Amchem*, 521 U.S. at 625-26 (emphasis added) (quoting *E. Tex. Motor Freight Sys., Inc.* v. *Rodriguez*, 431 U.S. 395, 403 (1977)); *see also Dukes*, 131 S. Ct. at 2551 ("Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'") (citation omitted). "The adequacy-of-representation requirement [and the] commonality and typicality criteria" serve as critical "guideposts" for determining whether the named plaintiff's claim and the class claims are "so interrelated that the interests of the class members will be fairly and adequately protected." *Amchem*, 521 U.S. at 626 n.20 (quoting *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 157 n.13 (1982)).

Where, as here, the named plaintiff's claims have been mooted by an offer of complete relief, he necessarily lacks the "same interest" as the absent putative class members who have not received such an offer. Whatever has motivated the lead plaintiff to spurn a "generous immediate payment[]" undoubtedly "tugs against the interest" of at least some of the class members he ostensibly represents. *Amchem*, 521 U.S. at 626. A named plaintiff with such misaligned interests is both an atypical and inadequate class representative as a matter of law. *Id.*

Rule 23 also requires class counsel to adequately represent their clients' interests. Fed. R. Civ. P 23(a)(4). The touchstone of adequate representation is the alignment of counsel's and the client's interests. *Falcon*, 457 U.S. at 157 n.13. Yet the decision below creates "perverse incentives," *Dukes*, 131 S. Ct. at 2559, for lawyers to discourage their clients from accepting full settlement offers, even though the client will almost certainly recover less at the conclusion of the litigation and does not seek any more. Moreover, a named plaintiff may even have to pay all parties' costs under Rule 68(d), with no potential for gain but his lawyer's. *Cf. AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1753 (2011) (noting that plaintiffs would have been "better off" accepting an arbitration offer "than they would have been as participants in a class action"). Thus, the decision below pits the client's interests against those of his counsel at this critical juncture.

Worse, the Ninth Circuit's ruling permits lawyers to fully control class litigation without accountability to a client with a personal interest in the lawsuit. It is a foundational principle of legal ethics that the attorney should abide by the *client's* preferences

and litigation goals, and not his own self-interest. *See* Model Rules of Prof'l Conduct R. 1.2(a) (2000) ("A lawyer shall abide by a client's decisions concerning the objectives of representation ...."). The rule endorsed by the Ninth Circuit turns this well-established model upside down, with troubling and uncertain consequences.

Class litigation is *already* excessively lawyer-driven and "dysfunctional," because often "the principals [i.e., the plaintiffs] cannot effectively monitor their agent [i.e., their lawyer]." John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 371 (2000). Lawyers freely "ignore the preferences of individual class members" and "define the goals of the litigation differently than they otherwise would [in the non-class action context]." *Id.* at 379.[2] And that is when class counsel actually have an interested client to whom they theoretically owe fiduciary duties; one can only imagine the re-

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[2] *See also, e.g.*, *Pearson* v. *NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (rejecting class settlement, and noting the "incentive of class counsel, in complicity with the defendant's counsel, to sell out the class," due in part to the fact that "[c]lass counsel rarely have clients to whom they are responsive"); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717–18 (6th Cir. 2013) (rejecting class certification under the adequacy prong and observing that in class actions, "unlike in virtually every other kind of case," the court "cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class"); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 163 (2003) (recognizing the general tendency of class counsel to "embrace a settlement inadequate for all, many, or some class members in exchange for the prospect of obtaining a fee award").

sults in a system that permits lawyers lacking clients with a personal stake in the case's outcome to maintain putative class actions. This lack of accountability is even more acute in the context of *putative* class actions, where no Rule 23 inquiry has taken place to test the adequacy of class counsel and to formally establish the duties owed to the absent class members.

The decision below also invites gamesmanship by rewarding lawyers who successfully dissuade their clients from accepting full offers of judgment. This Court, however, has repeatedly rejected gamesmanship by class counsel who are more concerned with their fees than with their clients' recovery.

In *Standard Fire*, 133 S. Ct. 1345, this Court considered a common tactic by lawyers to "stipulate away" putative class claims above $5 million in order to evade federal jurisdiction under the Class Action Fairness Act of 2005. The Court unanimously rejected that gambit, holding that named plaintiffs and their lawyers could not bind absent class members with such self-serving stipulations.

Likewise, in *Dukes*, 131 S. Ct. 2541, the Court rejected an interpretation of Rule 23(b)(2) that would permit class certification when a request for injunctive and declaratory relief "predominates" over a request for monetary relief, because such an interpretation "creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief." *Id.* at 2559. That concern was not merely theoretical, as the *Dukes* plaintiffs had declined to include claims for compensatory damages in their complaint—claims that absent class members might be collaterally estopped from ever bringing—in order to minimize their monetary claims and increase their chances of Rule 23(b)(2) certification.

"That possibility," this Court unanimously held, "underscores the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives'." *Id.*

These tactics all served to benefit class counsel at the expense of their clients. The decision below incentivizes similarly dangerous conduct: Clients who are pressured or manipulated into rejecting full settlement offers are not just sacrificing significant and immediate monetary relief—they also may be assuming, perhaps unknowingly, the risk of liability for Rule 68 costs at the conclusion of the litigation. No client should be put in such a position simply because her lawyer wishes to pursue a class action for a potentially bigger payday.

III. Settlements Benefit All Parties And The Judicial System

Permitting class litigation to continue despite an offer of complete relief would also undermine the legislative and judicial policy in favor of settlement. The TCPA, in particular, is premised on a remedial scheme that contemplates individual actions and settlements. And the fear that defendants will frustrate Rule 23 by attempting to "pick off" named plaintiffs seriatim is unfounded except in frivolous cases where putative class counsel cannot find a significant number of plaintiffs willing to step forward for a guaranteed full-offer settlement.

1. Settlement "'eases crowded court dockets and results in savings to the litigants and the judicial system,'" and thus, in appropriate cases, should "'be facilitated at as early a stage of the litigation as possible.'" *Bell Atl. Corp.* v. *Bolger*, 2 F.3d 1304, 1314 n.16 (3d Cir. 1993) (quoting Fed. R. Civ. P 16(c) ad-

visory committee's note to 1983 amendment). Specifically, settlements "conserve[] scarce judicial resources" in an already-overburdened court system with a substantial case backlog. *In re Smith*, 926 F.2d 1027, 1029 (11th Cir. 1991) (per curiam). They also reduce the expense and risk of litigation for the parties, other litigants, and the taxpayers. *See, e.g.*, *Marek* v. *Chesny*, 473 U.S. 1, 10 (1985) (noting that "settlements rather than litigation will serve the interests of plaintiffs as well as defendants"); *Am. Sec. Vanlines, Inc.* v. *Gallagher*, 782 F.2d 1056, 1060 n.5 (D.C. Cir 1986) (per curiam) ("settlements promote efficient use of private resources by reducing litigation and related costs"); *Aro Corp.* v. *Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976) ("By [settlement] agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before over-burdened courts, and to the citizens whose taxes support the latter."). Settlements are credited not only for reducing the number and cost of existing lawsuits, but also for "promot[ing] more lasting conciliation." Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 Hastings L.J. 9, 27 (1996).

Given these significant benefits, judicial policy has long favored settlement. *See St. Louis Mining & Milling Co.* v. *Mont. Mining Co.*, 171 U.S. 650, 656 (1898) ("settlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored"); *Autera* v. *Robinson*, 419 F.2d 1197, 1199 (D.C. Cir. 1969) ("there is everything to be gained by encouraging methodology that facilitates compromise"); *Miller* v. *Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 428 (5th Cir. 1977) ("Settlement agreements are

'highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits.'") (quoting *Pearson* v. *Ecological Sci. Corp.*, 522 F.2d 171, 176 (5th Cir. 1975)).

In addition, the policy favoring settlement in appropriate cases has received strong support in other legal sources. For example, the courts and Congress have institutionalized their approval of the policy by adopting rules that are designed to facilitate and encourage settlements, not least of which is Rule 68 of the Federal Rules of Civil Procedure. The Advisory Committee could not have stated Rule 68's objective any more clearly: "to encourage settlement and avoid protracted litigation." Fed. R. Civ. P 68 advisory committee's note to 1946 amendment.

Defendants often make full settlement offers because they believe that fully compensating the plaintiff will resolve the litigation. But if the plaintiff purports to represent a class, and the putative class claims continue to exist despite a full settlement with the putative representative, defendants have little incentive to make such offers, even if they would serve everyone's interest. The rule adopted by the Ninth Circuit forces defendants to litigate even meritless class actions all the way through certification. Such a result wastes judicial resources, generates excessive litigation costs, and prevents named plaintiffs from timely receiving any compensation for their alleged injury, all the while placing them at risk for substantial costs.

2. The decision below is especially pernicious in cases like this, where Congress's remedial scheme

contemplates individual actions and settlements. The TCPA, which prohibits certain unauthorized phone calls, faxes, and text messages, permits plaintiffs to recover up to $500 per negligent violation and up to $1,500 per knowing and/or willful violation, *plus* attorneys' fees—penalties that far outweigh the actual harm or nuisance suffered by a person on the wrong end of an errant marketing call or text message. *See* 47 U.S.C. § 227(b)(3); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1878 (2006) (explaining that the aggregation of "statutory damages that have been decoupled from claimants' actual losses" causes "troubling" and "glaring" class settlement pressure). Congress selected these amounts not to approximate a plaintiff's actual harm, but instead to "encourag[e] enforcement by ... *individual citizens*." *S. 1462, The Automated Telephone Consumer Protection Act of 1991; S. 1410, The Telephone Advertising Consumer Protection Act; and S. 857, Equal Billing for Long Distance Charges: Hearing Before the S. Subcomm. on Communications of the S. Comm. of Commerce, Science and Transportation*, 102d Cong. 42 (1991) (statement of Michael Jacobson, Cofounder, Ctr. for the Study of Commercialism) (emphasis added).[3] The amounts are also sufficiently high "to deter violations by telemarketers," even if only a small percentage of affected persons choose to take action. *Id.*

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[3] *See also Concepcion*, 131 S. Ct. at 1753 (rejecting the notion "that class proceedings are necessary to prosecute small-dollar claims" when a plaintiff's arbitration agreement provides that AT&T will pay claimants a minimum of $7,500 if they obtain an award greater than AT&T's last settlement offer).

Class actions distort and disturb this remedial scheme. Nothing in the legislative history of the TCPA suggests that Congress intended, or even contemplated, that telemarketing companies would face hundreds of millions or even billions of dollars of potentially ruinous liability for sending a single, mass text message, as Petitioner did here. But that is exactly the risk that exists where class actions exponentially multiply statutory damages claims. *See* Nagareda, *supra*, 106 Colum. L. Rev. at 1881 ("[C]lass settlement pressure is most troubling when aggregation would not merely enable the enforcement of cost-prohibitive claims, but in addition, would distort the underlying remedial scheme."); Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 115 (2009) ("Aggregating statutory damages claims warps the purpose of both statutory damages and class actions.").

Congress did not envision this type of civil enforcement. Instead, it contemplated that, in addition to enforcement by state attorneys general, *see* 47 U.S.C. § 227(g), individuals would sue in "[s]mall claims court or a similar court," and that the resulting "amount of damages" in *that* type of litigation is designed "to be fair to both the consumer and the telemarketer." 137 Cong. Rec. S16205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings). Defendants that make full settlement offers thus behave in accordance with the incentives Congress established; any argument that such offers frustrate the TCPA's remedial scheme is baseless.

3. Finally, the Ninth Circuit's concern that defendants could pretermit class actions by "pick[ing]

off" named plaintiffs is exactly backward. Pet. App. 6a (internal quotation marks omitted). So-called "picking off" the class representative by making a full offer of settlement is unlikely to be an effective long-term strategy. Nothing bars savvy attorneys with class action complaints in hand from recruiting new putative class representatives and refiling a slightly modified complaint once their original client has received the full value of his or her claims. The defendant must then decide whether to defend itself or to settle with these second-generation class representatives by making another complete offer of relief.

A defendant that continues to offer 100 percent of the amount claimed to every successive would-be class representative is likely to invite a feeding frenzy of claims. Eventually, a defendant confronted with so many claims may conclude that it would *benefit* from class certification so that it can attempt to settle all of the claims against it for something less than 100 cents on the dollar. From the defendant's financial perspective, this outcome is far more rational than "picking off" individual plaintiffs one by one.

A defense strategy of resolving litigation through full settlement offers is therefore best suited for cases where putative class counsel cannot find a significant number of plaintiffs willing to step forward for a guaranteed full-offer settlement. And those situations—in which enterprising plaintiffs' lawyers are unable to find a significant number of individuals who care enough about the alleged violation to seek relief on their own behalf—are precisely the class ac-

tions that federal courts should not bend the rules to save.

CONCLUSION

For the reasons stated above and in Petitioner's brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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CAMPBELL-EWALD COMPANY,
Petitioner,

v.

JOSE GOMEZ,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text, history, and values, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1991, Congress enacted the Telephone Consumer Protection Act ("TCPA") in response to "consumer[] outrage[] over the proliferation of intrusive, nuisance calls to their homes from telemarketers." Pub. L. No. 102-243, sec. 2(6), 105 Stat. 2394 (codified at 47 U.S.C. § 227 (2010)). Concluding that "automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call," *id.* sec. 2(13), Congress imposed limits on such calls. Among other things, Congress prohibited the use of automatic telephone dialing systems to make calls to cellular phones except in emergencies or with the pri-

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

or express consent of the called party. 47 U.S.C. § 227(b)(1)(A)(iii).

Notwithstanding those legal prohibitions, Campbell-Ewald Company ("Campbell-Ewald"), a marketing consultant, caused text messages (which undisputedly constitute "call[s]" within the meaning of the TCPA for purposes of this lawsuit) to be sent using automated dialing equipment to the cell phones of roughly 100,000 people who had not consented to receive those messages. Respondent Jose Gomez was one of those roughly 100,000 people and sued Campbell-Ewald on behalf of a proposed class of recipients of the unauthorized texts. Before the time for filing a motion for class certification had lapsed, Campbell-Ewald served Gomez with an offer of judgment under Federal Rule of Civil Procedure 68. Gomez moved to quash and strike the offer of judgment and moved for class certification as soon as permitted under the district court's local rules.

Even though Gomez did not accept the offer of judgment, and even though he was seeking to represent a class of similarly situated recipients of these unwanted text messages, Campbell-Ewald now argues that its unilateral decision to make an offer of judgment to Gomez as an individual not only moots Gomez's individual claims, but also his class claims. This is plainly wrong. As Gomez demonstrates in his brief, an offer of judgment that a plaintiff does not accept does not moot the plaintiff's individual claims because those claims remain unsatisfied, which means a court could provide an effectual remedy. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1533-34 (2013) (Kagan, J., dissenting) ("the recipient's rejection of an offer 'leaves the matter as if no offer had ever been made,'" which means that after the offer expired, "[the plaintiff's] individual stake in

the lawsuit thus remained what it had always been, and ditto the court's capacity to grant her relief" (quoting *Minneapolis & St. L. Ry. Co. v. Columbus Rolling-Mill Co.*, 119 U.S. 149, 151 (1886))); *see* Resp't Br. 27-31. This argument is itself sufficient to resolve this case in Gomez's favor.

But even if Gomez's individual claims were mooted by the unaccepted offer (which again they were not), the federal courts would still have jurisdiction to consider his class claims. Campbell-Ewald's arguments to the contrary fundamentally misunderstand the role of the federal courts in our constitutional system and the critical role Rule 23 class actions play in facilitating that role.

When the Framers drafted our enduring Constitution, their design sharply departed from the precursor Articles of Confederation in several respects. Most relevant here, the Framers created the judiciary as an independent, co-equal branch of government, vesting the newly-created federal courts with the "judicial power" to resolve nine categories of cases and controversies. By vesting this broad power in the judicial branch, the Framers sought to ensure that the federal courts would have the power to protect individual rights secured by federal law.

The provision of this power in the federal courts reflected the Framers' firmly held belief that where there is a legal right, there is also a legal remedy. Indeed, the Framers, who were steeped in English common law traditions, recognized that legal rights were meaningless without the right to go into court to obtain a remedy. As this Court recognized in *Marbury v. Madison*, "'[i]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'" 5 U.S. (1 Cranch.) 137, 163 (1803)

(quoting 3 William Blackstone, *Commentaries on the Laws of England* *23).

Federal Rule of Civil Procedure 23, which permits a representative party to sue on behalf of a class of similarly situated claimants where certain specified conditions are met, was designed, in part, to help effectuate the Framers' vision of the role Article III courts would play in our constitutional system. Rule 23 was originally adopted to codify a longstanding rule of equity that allowed for aggregate actions where the question was one of interest to too many people to allow them all to be brought before the court at the same time. But the Rule's Framers also wanted injured parties to be able to seek redress in the federal courts even when their claims were too small to make individual litigation economically feasible. Thus, the Rule was amended in 1966 to "create a procedural vehicle capable of 'enabling small people with small claims to vindicate their rights when they could not otherwise do so.'" John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 Miss. C. L. Rev. 323, 336-37 (2005) (quoting Memorandum from the Advisory Committee on Civil Rules to the Chairman and Members of the Standing Committee on Practice and Procedure of the Judicial Conference of the United States, Summary Statement of the Civil Rules Amendments Recommended for Adoption 7 (June 10, 1965)).

In this way, Rule 23 helps realize the Framers' vision for the federal courts: the Framers believed that where there is a legal right, there is a legal remedy; and Rule 23 ensures that similarly injured parties can seek that legal remedy in the federal courts even when their injuries are too small to make individual lawsuits feasible. It would fundamentally undermine both Rule 23 and Article III to hold that

class claims are mooted simply because the defendant has made an unaccepted offer to resolve the plaintiff's individual claims.

Indeed, this Court's precedents underscore the importance of the Rule 23 class action in ensuring that there is legal redress for injured parties. As the Court explained in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guar. Nat'l Bank*, 445 U.S. at 339. Thus, in that case, the Court held that the named plaintiffs had Article III standing to appeal the denial of class certification even after they were offered the amounts claimed in their individual capacities and judgment was entered in their favor on that basis. In *U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980), this Court reached essentially the same conclusion, holding that the denial of a motion for class certification may be reviewed on appeal even after the named plaintiff's personal claim has become "moot." According to the Court, the "elements [that make a dispute capable of judicial resolution] can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired." *Geraghty*, 445 U.S. at 403. Indeed, allowing a plaintiff to pursue class claims even after his individual claims have expired (which, again, is not the case here) furthers, rather than undermines, Article III values. Accordingly, the judgment of the court of appeals should be affirmed.

ARGUMENT

THIS COURT SHOULD HOLD THAT AN UNACCEPTED OFFER OF JUDGMENT CANNOT MOOT CLASS CLAIMS EVEN WHEN THE CLASS HAS NOT YET BEEN CERTIFIED

A. Allowing an Unaccepted Offer To Moot Class Claims Would Undermine One of Article III's Fundamental Purposes, Which Is To Ensure That Where There Is a Legal Right, There Is a Legal Remedy

1. The Framers Wrote Article III To Ensure That Where There Is a Legal Right, There Is a Remedy for Infringement of that Right

Article III of the Constitution broadly extends the "judicial Power" to nine categories of cases and controversies, including "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1. Article III's plain language empowers the "judicial department" to "decide all cases of every description, arising under the constitution or laws of the United States," extending to the federal courts the obligation "of deciding every judicial question which grows out of the constitution and laws." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382, 384 (1821).

The Constitution's sweeping grant of judicial power to the newly created federal courts was a direct response to the infirmities of the Articles of Confederation, which established a single branch of the federal government and no independent court system. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1443 (1987) (explaining that

Confederation courts were "pitiful creatures of Congress, dependent on its pleasure for their place, tenure, salary, and power"). Under the dysfunctional government established by the Articles of Confederation, individuals could not go to court to enforce federal legal protections, prompting Alexander Hamilton to observe that, "[l]aws are a dead letter without courts to expound and define their true meaning and operation." *The Federalist No. 22*, at 118 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The result, Madison explained, was that "acts of Cong[ress] depend[ed] for their execution on the will of the state legislatures," making federal laws "nominally authoritative, [but] in fact recommendatory only." James Madison, *Vices of the Political System of the United States* (Apr. 1787), *in* 9 *The Papers of James Madison* 345, 352 (Robert A. Rutland & William M. E. Rachal eds., 1975).

When the Framers gathered in Philadelphia to create a new national charter, they took pains to ensure that the federal courts would have the power to enforce federal legal protections. Time and again, the Framers explained that the power of the courts under Article III would be co-extensive with the broad legislative powers granted to Congress under Article I. As James Madison explained, "[a]n effective Judiciary establishment commensurate to the legislative authority, was essential." 1 Max Farrand, *The Records of the Federal Convention of 1787* at 124 (1911); *see id.* at 128 (urging Convention to "vest the Genl. Govt. with authority to erect an Independent Judicial, coextensive wt. ye. Nation" (Madison)); *id.* at 147 ("[T]he Judicial, Legislative and Executive departments ought to be commensurate." (Wilson)). The Framers understood that "[n]o government ought to be so defective in its organization, as not to contain within

itself the means of securing the execution of its own laws," and gave to the federal courts "the power of construing the constitution and laws of the Union in every case, and of preserving them from all violation from every quarter." *Cohens*, 19 U.S. at 387, 388.

The Framers wanted to endow the federal courts with these broad powers not only because they saw the harms caused by the absence of a strong, independent federal judiciary under the government established by the Articles of Confederation, but also because, consistent with English common law traditions, they recognized that legal rights were meaningless without the ability of individuals to go to court to obtain a legal remedy. In other words, they understood that for courts to play their essential role of expounding the law and vindicating individual rights, rights and remedies had to go hand in hand. As William Blackstone had written, it was a "general and indisputable rule, that where there is a legal right there is also a legal remedy, by suit or action at law, whenever that right is invaded." 3 William Blackstone, *Commentaries on the Laws of England* *23. "[I]n vain would rights be declared, in vain directed to be observed," Blackstone declared, "if there were no method of recovering and asserting these rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law." 1 *id.* at *55-56.

These fundamental rule-of-law values were affirmed by a number of Founding-era state constitutions, which explicitly guaranteed redress for a violation of a legal right. For example, the Massachusetts Constitution of 1780 provided that "[e]very subject . ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he

may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws." Mass. Const. of 1780, art. XI. Numerous other state constitutions used similar formulations to protect the right of individuals to seek redress in the courts for violations of their legal rights. *See, e.g.*, Md. Const. of 1776, art. XVII; N.H. Const. of 1784, art. XIV; Vt. Const. of 1786, ch. 1, para. 4; Pa. Const. of 1790, art. IX, § 11; Del. Const. of 1792, art. I, § 9; Ky. Const. of 1792, art. XII, § 13; Tenn. Const. of 1796, art. XI, § 17.

In the debates over ratification of the U.S. Constitution, Federalists and Anti-Federalists alike agreed that Article III gave the federal courts extensive powers to enforce federal legal commands. In the state ratifying conventions, supporters of the Constitution repeatedly made the case that "[t]he federal government ought to possess the means of carrying the laws into execution. If laws are not to be carried into execution by the interposition of the judiciary, how is it to be done?" 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 157 (Jonathan Elliot ed., 1836) (Davie); *see also* 3 *id.* at 517 (insisting that "the power of the judiciary must be coëxtensive with the legislative power, and reach to all parts of society" (Pendleton)); *id.* at 532 ("[I]t is so necessary and expedient that the judicial power should correspond with the legislative " (Madison)). Future Chief Justice John Marshall argued that it was "necessary that the federal courts should have cognizance of cases arising under the Constitution, and the laws, of the United States," observing that "the service or purpose of a judiciary" is to "execute the laws in a peaceable, orderly manner,

without shedding blood, or creating a contest, or availing yourselves of force[.] If this be the case, where can its jurisdiction be more necessary than here?" *Id.* at 554.

Anti-Federalists complained bitterly about Article III's broad sweep, insisting that "[t]he jurisdiction of all cases arising under the Constitution and the laws of the Union is of stupendous magnitude." *Id.* at 565 (Grayson). But these arguments did not carry the day. Rejecting Anti-Federalist claims that the breadth of judicial power conferred in Article III was too sweeping, the American people ratified the Constitution, giving the newly created federal courts broad judicial power to ensure that "the Constitution should be carried into effect, that the laws should be executed, justice equally done to all the community, and treaties observed." 4 *id.* at 160 (Davie).

In *Marbury v. Madison*, Chief Justice Marshall reaffirmed the fundamental rule-of-law principles that the U.S. Constitution secured, explaining that, under Article III, a broad understanding of an individual's right to go to court to redress violations of personal rights was necessary to ensure "[t]he very essence of civil liberty" and realize our Constitution's promise of a "government of laws, and not of men." *Marbury*, 5 U.S. at 170, 163. Marshall also invoked Blackstone's discussion of common law principles that ensure that "'every right, when withheld, must have a remedy, and every injury its proper redress.'" *Id.* (quoting 3 Blackstone, *supra*, *109). Thus, he concluded, "wher[e] a specific duty is assigned by law, and individual rights depend upon the performance of that duty, . . . the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Id.* at 166; *see Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 350 (1816) (rejecting

construction of Article III because the result "would, in many cases, be rights without corresponding remedies"); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838) (explaining that it would be a "monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist").

During the Framing-era, courts in both England and the United States routinely applied the rule that where there is a legal right there is also a legal remedy. In the celebrated case of *Ashby v. White*, (1702) 92 Eng. Rep. 126, for example, Chief Judge Holt explained that "[i]f the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy." *Ashby*, 92 Eng. Rep. at 136 (Holt, C.J., dissenting), *rev'd*, (1703) 91 Eng. Rep. 665;[2] *see Whipple v. Cumberland Mfg. Co.*, 29 F. Cas. 934, 936 (C.C.D. Me. 1843) (Story, J.) (holding that "wherever a wrong is done to a right, the law imports, that there is some damage to the right, and, in the absence of any other proof of substantial damage, nominal damages will be given in support of the right" and explaining that "[t]his is a well-known and well-settled doctrine in the law"); *Hendrick v. Cook*, 4 Ga. 241, 261 (1848) ("whenever there has been an illegal invasion of the *rights* of another, it is an *injury*, for which he is entitled to a remedy by an action" (emphasis in original)); *Parker v. Griswold*, 17 Conn. 288, 303 (1846) ("An injury is a wrong; and for the re-

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[2] Holt's opinion, though delivered in dissent, "prevailed on appeal in the House of Lords" and was regarded as "correctly stating the law." F. Andrew Hessick, *Standing, Injury In Fact, and Private Rights*, 93 Cornell L. Rev. 275, 282-83 (2008).

dress of every wrong there is a remedy Where therefore there has been a violation of a right, the person injured is entitled to an action."); *Allaire v. Whitney*, 1 Hill 484, 487 (N.Y. Sup. Ct. 1841) ("[A]ctual damage is not necessary to an action. A violation of right with a possibility of damage, forms the ground of an action.").

Thus, when the Framers drafted Article III, they were acting against the backdrop of a long history of common law precedents that firmly established that where there is a legal wrong, there is a legal remedy. And they conferred on the federal courts a broad "judicial power" capacious enough to ensure that the federal courts could, in fact, provide legal remedies to redress legal wrongs. Federal Rule of Civil Procedure 23 was adopted, in part, to facilitate the courts' ability to play their intended role in our constitutional system, as the next Section demonstrates.

2. Rule 23 Was Adopted, In Part, To Facilitate the Ability of the Federal Courts To Fulfill Article III's Goal of Establishing a Forum Capable of Providing Redress for All Legal Wrongs

Rule 23 provides that "[a] class action may be maintained if," among other things, "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). First promulgated in 1938, the original Rule 23 was adopted to codify a rule of equity that permitted class actions where cases involved a question of "common or general interest to many persons constituting a class so numerous as to make it im-

practicable to bring them all before the court." Fed. R. Civ. P. 23, 1937 advisory committee note to subdivision (a); *see Smith v. Swormstedt*, 57 U.S. 288, 302 (1853) ("The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others.").

Although the rule as originally drafted ended up raising more questions than it answered about how class claims should be litigated, *see* Fed. R. Civ. P. 23, 1966 advisory committee notes, "the [advisory] committee [on the Federal Civil Rules] was convinced that the preservation of class actions to address common issues of fact or law was appropriate and necessary." Rabiej, *supra*, at 333. Indeed, commentators at the time recognized that class claims could not only be efficient for the courts, but could also provide real benefits to injured parties, allowing them to bring cases in contexts in which it would not otherwise be practically feasible: "Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive." Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684, 686 (1940); *id.* at 685 (discussing a case in which "almost no single investor's stake would warrant the enormous expense of his seeking legal redress").

Indeed, in the years immediately preceding the amendment of the Rule, lower courts "recognized the need for a vehicle to redress properly the grievances of small claimants." Tom Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C.L. Rev.

501, 505 (1969). The Second Circuit, for example, recognized that "there is a particular need for the representative action as a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group." *Escott v. Barchris Constr. Corp.*, 340 F.2d 731, 733 (2d Cir. 1965); *see Dolgow v. Anderson*, 43 F.R.D. 472, 485 (E.D.N.Y. 1968), *judgment rev'd*, 438 F.2d 825 (2d Cir. 1970) ("in view of the fact that the costs of the litigation would far exceed any damages the individual plaintiffs might possibly recover, if this case does not proceed as a class action, it is unlikely that it would proceed at all. Thus, to hold that this action could not proceed as a class action 'would be tantamount to a denial of private relief.'" (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964), *abrogated by Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001))).

Responding to these needs, when the committee set out to revise Rule 23, one of its key goals was "to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Benjamin Kaplan, *A Prefatory Note*, 10 B.C.L. Rev. 497, 497 (1969);[3] *see id.* (noting that "[t]he reform of Rule 23 was intended to rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties"). As Judge Weinstein, whose academic writing "encourage[d]" the committee, *id.* at 499, noted, one of the advantages of class actions is that "[s]ome

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[3] Kaplan was "reporter to the Advisory Committee on Civil Rules from its organization in 1960 to July 1, 1966" and subsequently was "a member of the Committee." He notes, though, that "[t]he views expressed [in his article] are entirely personal." Kaplan, *supra*, at 497 n.*

claims are individually so small that they cannot, as a practical matter, be enforced." Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buff. L. Rev. 433, 435 (1959).

Thus, part of the 1966 Amendment was the introduction of the Rule 23(b)(3) class action, which "encompasse[d] those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P 23, 1966 advisory committee notes. "The expressed purpose of [this] amendment was [among other things] to create a procedural vehicle capable 'of enabling small people with small claims to vindicate their rights when they could not otherwise do so.'" Rabiej, *supra*, at 336-37 (quoting Memorandum from the Advisory Committee on Civil Rules, *supra*, at 7); *see* Kaplan, *supra*, at 497 (the Advisory Committee had dominantly in mind vindication of "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all"). As one scholar wrote shortly after the Rule's amendment, one of the three purposes of the amended rule—"probably the most important"—was to "provide a vehicle for redressing small injuries to a large number of persons." Ford, *supra*, at 504; *see* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286, 315-16 (2013) ("The amendment also clearly envisioned the use of the class action to empower those without 'effective strength' to advance their claims, most notably when each individual's damages were so small that economically they had no independent litigation value.").

> Indeed, in noting that the court must conclude that such a class action is "superior" to the other possible procedures for handling the case, the Advisory Committee Notes observe that one relevant factor is whether "the amounts at stake for individuals may be so small that separate suits would be impracticable." Fed. R. Civ. P. 23, 1966 advisory committee notes.

Subsequent meetings of the Civil Rules Advisory Committee have confirmed that Rule 23(b)(3) class actions were intended to provide a means for redressing legal wrongs when the size of the potential remedy would make individual suits impractical. *See* 1 *Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23* at 204 (Rules Comm. Support Office, Admin. Office of the U.S. Courts, May 1, 1997) ("(b)(3) classes represent both the dramatic expansion of remedies for small claims that could not profitably be pursued in individual actions and the growing efforts to aggregate claims that are (or would be) brought in individual actions"); *id.* at 238 (noting "the familiar phenomenon of class litigation to enforce claims that are strong on the merits but that would not bear the expense of individual litigation").

And this Court, too, has recognized that making it possible for small claimants to go to court was a critical goal of the drafters of the Rule 23 amendment:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *see Deposit Guar. Nat'l Bank*, 445 U.S. at 339 ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.").

In sum, Federal Rule 23 was enacted to help ensure that Article III courts are able to provide legal remedies to redress legal wrongs, just as the Framers intended. Campbell-Ewald is wrong to argue that the federal courts do not have jurisdiction to adjudicate such claims simply because the defendant has made an offer of judgment that the plaintiff did not accept, as the next Section explains.

3. Campbell-Ewald's Jurisdictional and Policy Arguments Are Wrong and Misunderstand the Text and History of Both Article III and Federal Rule 23

As just discussed, a plaintiff's assertion of class claims helps effectuate the underlying purpose of Article III, and it would therefore fundamentally undermine the role of Article III courts to hold that such claims are moot simply because the defendant has made an unaccepted offer to resolve the plaintiff's individual claims. Campbell-Ewald's argument that Rule 23 does not "enlarge the jurisdiction of the courts" (Pet'r Br. 26) simply misses the point. The Article III courts were created to ensure that there is a federal forum available in which injured parties can seek legal remedies to redress legal wrongs. *See supra* at 8-12. When a plaintiff is asserting claims on behalf of a group of people whose federal legal rights

have been violated in similar fashion, such a claim falls quintessentially within the jurisdiction of the federal courts. That the plaintiff could have had his *individual* claim satisfied does nothing to change that fact. A court could still grant "effectual relief" on the class claims, and the case therefore is not moot. *See Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2287 (2012) (quoting *Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)).

Campbell-Ewald argues that this Court's decision in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), "underscores the point" that an individual's class claims are "extinguished" when his individual claims are. Pet'r Br. 27. Not so. In fact, this Court explicitly distinguished cases involving class action claims from the collective action claims at issue in *Genesis*, noting that "Rule 23 actions are fundamentally different from collective actions under the FLSA." *Genesis*, 133 S. Ct. at 1529. Among other things, whereas "a putative class acquires an independent legal status once it is certified under Rule 23," "[t]he sole consequence of conditional certification [of an FLSA collective action] is the sending of court-approved written notice to employees," who need to "fil[e] written consent with the court" in order to join the action. *Id.* at 1530. That similarly situated parties are automatically bound by a class action unless they affirmatively choose to opt out is consistent with the class action's role as a vehicle for allowing injured parties to bring small claims that would not otherwise be redressable. *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem'*, 92 Harv. L. Rev. 664, 674 (1979) ("The effect [of the shift from opt in to opt out] is to facilitate the aggregation of relatively small claims that are not indi-

vidually economically viable into a group claim that is sufficiently credible to be taken seriously."). And that is why it is inconsistent with both Rule 23 and Article III to hold that an unaccepted offer of judgment on an individual plaintiff's claims can moot *class* claims, simply because a class has not yet been certified.

Campbell-Ewald also argues that "the dismissal of this case would better serve the interests of Rule 23 and any other potential claimants" because absent class members may not receive the full measure of statutory damages that the TCPA offers. Pet'r Br. 33. This argument ignores entirely that absent the ability to use a Rule 23 class action to seek relief for violations of the TCPA, most absent class members will receive no damages at all. *See* Miller, *Simplified Pleading*, *supra*, at 318 ("Realistically, the choice for class members is between collective access to the judicial system or no access at all."). Indeed, this was, as discussed earlier, a major reason why Rule 23 was amended to include the Rule 23(b)(3) class action in the first place. The drafters of the 1966 amendments to Rule 23 understood that in the absence of a class action device, many small claims would not be brought at all, and as a result, the federal courts would not be fulfilling their Article III purpose of providing a forum for the redress of legal wrongs.

Indeed, this Court has recognized that allowing defendants to moot class claims by making settlement offers to named plaintiffs would undermine this purpose of Rule 23. When considering whether a rejected offer could moot named plaintiffs' ability to appeal the denial of class certification, the Court noted

> [t]o deny the right to appeal simply because the defendant has sought to 'buy off' the

> individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

Deposit Guar. Nat'l Bank, 445 U.S. at 339. In short, an unaccepted offer of judgment, whatever its effect on individual claims, cannot moot class claims.

B. This Court's Precedents Underscore That an Unaccepted Offer of Judgment Cannot Moot a Plaintiff's Class Claims

This Court's precedents underscore that an unaccepted offer of judgment cannot moot a plaintiff's interest in litigating his class claims.

In *Deposit Guaranty National Bank*, the Court considered whether "a tender to named plaintiffs in a class action of the amounts claimed in their individual capacities, followed by the entry of judgment in their favor on the basis of that tender, over their objection, moots the case and terminates their right to appeal the denial of class certification." *Id.* at 327. Recognizing the plaintiffs' "right to assert their own claims in the framework of a class action," this Court explained that "[n]either the rejected tender nor the dismissal of the action over plaintiffs' objections mooted the plaintiffs' claim on the merits so long as they retained an economic interest in class certification." *Id.* at 332-33; *see* Resp't Br. 12 (noting that

"Mr. Gomez retains an indisputable financial interest in the class-certification decision"); *id.* at 35 (discussing Mr. Gomez's "material interests in continuing the litigation").

Thus, while the Court "assume[d] that a district court's final judgment fully satisfying named plaintiffs' private substantive claims would preclude their appeal on that aspect of the final judgment," the Court also explained that "it does not follow that this circumstance would terminate the named plaintiffs' right to take an appeal on the issue of class certification." *Deposit Guar. Nat'l Bank*, 445 U.S. at 333. Noting that plaintiffs "have maintained throughout this appellate litigation that they retain a continuing individual interest in the resolution of the class certification question," the Court observed that "[t]he use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs" because "it may motivate them to bring cases that for economic reasons might not be brought otherwise." *Id.* at 336, 338. The Court thus held that plaintiffs retained an "individual interest in the litigation sufficient to permit their appeal of the adverse certification ruling." *Id.* at 340 (emphasis omitted).

This Court's holding in *U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980), also supports Gomez's claim here. There, this Court held that a court may review a denial of class certification even after the named plaintiff's personal claim has become moot, explaining that the "elements [necessary to assure a dispute capable of judicial resolution] can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired." *Geraghty*, 445 U.S. at 403. As the Court explained, "[t]he question whether class

certification is appropriate remains as a concrete, sharply presented issue." *Id.* at 403-04; *see id.* at 404 ("The proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined."). To be sure, this Court in *Genesis* distinguished *Geraghty*, in part on the ground that the "named plaintiff's claim remain[ed] live at the time the district court denie[d] class certification," but the Court's "[m]ore fundamental[]" reason for distinguishing that case was that "a putative class acquires an independent legal status once it is certified under Rule 23" in a way that a collective action does not. 133 S. Ct. at 1530. That basis for distinguishing *Geraghty* obviously has no application here. Indeed, the fundamental rationale for this Court's decisions in both *Geraghty* and *Roper* was that a plaintiff retains an interest in determining whether class certification is appropriate even after his individual claim is mooted, and that rationale makes sense in light of the values underlying both Rule 23 and Article III.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court below.

Respectfully submitted,

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Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE CONSUMER DATA INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Consumer Data Industry Association ("CDIA") is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its kind in the world, with a membership of approximately 180 consumer credit and other specialized CRAs operating throughout the United States and the world.

In its more than 100-year history, CDIA has worked with the United States Congress and state legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer report information. In this role, CDIA participated in the legislative efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, in 1970, and its subsequent amendments.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), letters from all parties consenting to the filing of *amicus* briefs have been submitted to the Clerk.

CDIA has a significant interest in this case because its members face an onslaught of class litigation under the FCRA. CRAs perform the economically vital function of gathering large amounts of consumer information and making that information available for use in credit decisions. Operating in a heavily regulated context, CRAs' activities by necessity touch on the vast majority of adult Americans, and entail the handling of billions of discrete pieces of data. Because of the large-scale nature of their businesses, coupled with a legislative scheme that a number of courts have construed to provide uncapped statutory damages irrespective of actual harm, CRAs have become a target of the class action bar. Many of the cases that are brought against CRAs are based on alleged violations that are technical at best, but because the potential liabilities are so enormous, class action lawyers are able to leverage lucrative settlements.

The issue in this case—whether an individual whose own claim has been fully satisfied can nonetheless pursue litigation against a defendant for claimed statutory violations against other people—goes to the heart of the distinction between regulation and litigation. If a novel exception to Article III mootness principles permits such litigation, the result is to blur that important line and allow class action attorneys to operate as private enforcers of the law. As the experience of CDIA's members illustrates, there is a stark difference between the Executive Branch enforcing the FCRA in the public interest and private attorneys enforcing it as a means to extract settlements.

INTRODUCTION AND SUMMARY OF ARGUMENT

Suppose that James Madison, having been sued by William Marbury, had relented and delivered to Marbury his commission. Suppose further that Mr. Marbury had shut his door and refused to accept it, announcing to the Secretary of State that instead of having his injury redressed in full, he was more interested in hearing the Supreme Court expound on the issue of judicial review, and in ensuring that commissions not be illegally denied to other Federalists. *See generally Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Michael W. McConnell, *The Story of* Marbury v. Madison: *Making Defeat Look Like Victory* 13, 18, *in* Constitutional Law Stories (M. Dorf ed., 2004) (noting the "sheaf of [undelivered] commissions" left behind by President Adams). Would Chief Justice Marshall have humored Mr. Marbury's academic interest in hearing the Court "say what the law is"? *Marbury*, 5 U.S. at 177. Of course not. *See Flast v. Cohen*, 392 U.S. 83, 96 n.14 (1968) ("The rule against advisory opinions was established as early as 1793, and the rule has been adhered to without deviation." (internal citation omitted)).

The question presented here is the same: the plaintiff has made a demand and the defendant has acceded to it in full, but the plaintiff has refused to take yes for an answer and instead insists on continuing to pursue litigation to obtain what he has already been offered. The only reason Respondent can even arguably claim to have a live "Case or Controversy" is that his ambitions go beyond full redress of his individual claim. Respondent declined

to be made whole so that he could pursue other people's claims. More to the point, Respondent's attorneys persuaded him not to accept full relief so that they could proceed with a class action, demand staggering damages, and extract a lucrative settlement.

This invocation of the judicial power is untenable. The Constitution draws a sharp distinction between true cases or controversies brought by an individual for the redress of his own injuries, and the more sweeping power to enforce the law that is vested in the Executive Branch. By refusing an offer of complete relief so that he could challenge Petitioner's alleged violations against strangers, Respondent has made clear what kind of case he wishes to bring: he—and his lawyers—want to enforce the law for a bounty.

In an era of class actions and threats of annihilating statutory damages often based on minor or technical alleged violations, the ability to offer a plaintiff full relief is a vital check. This is made particularly clear in the case of the consumer data industry, which faces uncapped statutory damages for claims under the Fair Credit Reporting Act ("FCRA"). If many individuals are truly harmed by the conduct challenged in a lawsuit, new plaintiffs would surely surface and demand their share of the relief; any sustained strategy to "pick off" new plaintiffs would be self-defeating. But if an enterprising attorney cannot identify anyone else motivated to file a lawsuit, then the offer of judgment has served the valuable purpose of keeping an abstract law enforcement action out of Article III courts. That result may be a loss for the class action

bar, but it is a victory for the separation of powers. The Court should not create an exception to ordinary mootness principles that blurs the line between Article III cases or controversies and the Article II power to take care that the laws be faithfully executed.

1. a. Article III courts are restricted to deciding "Cases or Controversies" in which an aggrieved individual has a live stake in the dispute. Private litigation stands in stark contrast to regulation and enforcement by Executive Branch agencies. Unlike private litigants, Executive Branch agencies are entrusted with the sensitive policy decisions necessary to making law enforcement choices, including the discretion to *decline* to take enforcement action. The Constitution requires this important power to be exercised by public officers who are accountable to the people for their actions, and are charged with protecting the public interest. Policing the line between Article III litigation and Article II law enforcement is thus an important separation of powers concern.

That concern does not disappear when a case is filed as a putative class action. The class action is simply a procedural device for aggregating claims, not a license to serve as a private attorney general. Yet without strict adherence to the Article III "Case or Controversy" requirement, class actions threaten to become private law enforcement actions without any accountability.

b. Mootness doctrine is an aspect of the "Case or Controversy" requirement that ensures the judiciary is not asked to interfere with the Executive's law enforcement decisions. Because the

courts have no role left to play once a plaintiff has been offered everything his lawsuit demands, mootness principles preclude him from proceeding. The existence of a putative class action does not change this analysis. That follows both from this Court's decision in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), as well as from the separation of powers concerns that animate Article III, which foreclose a private individual from prosecuting alleged violations of a statute committed against *other people*.

The theory that defendants might attempt to "pick off" class representatives offers no basis for creating a special exception to mootness. When many people are genuinely injured, offers of judgment would generally just spur others to file claims. That is particularly likely under statutes such as the Fair Credit Reporting Act that provide for attorney's fees. By contrast, if a long line of new plaintiffs does *not* materialize, that is simply an indication that the case is an abstract attempt by private class action attorneys to enforce the law—exactly the sort of case that does not belong in Article III court.

2. The consumer data industry's experience demonstrates the need to maintain the distinction between regulatory law enforcement and Article III litigation. CRAs deal with massive amounts of information relating to hundreds of millions of consumers. They are heavily regulated by the FCRA, and subject to vigorous oversight and enforcement from federal agencies. While regulators have been aggressive, they have generally set priorities based on the needs of consumer protection,

and sought to correct perceived issues in proactive and cooperative ways.

Private attorneys, unsurprisingly, pursue class actions based on the possibility of extracting lucrative settlements, not the public interest. FCRA cases are ubiquitous, and, simply because of the size of the classes at issue, exert tremendous settlement pressure. It is in this context that CRAs and other FCRA defendants consider whether to offer full relief at the outset. If, after an offer of judgment to the putative class representative, not a single member of a million-person strong class comes forward to file a new claim, mootness principles will have ensured that a private law enforcement action is properly kept out of Article III courts.

ARGUMENT

I. "Headless" Class Actions Are An Improper Species Of Private Law Enforcement, Not Bona Fide "Cases or Controversies."

A. Article III's "Case or Controversy" Requirement Safeguards The Distinction Between Litigation And Regulatory Enforcement.

"Article III, § 2, of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies,' which restricts the authority of federal courts to resolving 'the legal rights of litigants in actual controversies.'" *Genesis Healthcare*, 133 S. Ct. at 1528 (quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982)). This principle restricts the judiciary "to its

constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved." *Id.* "'The province of the court,' as Chief Justice Marshall said in *Marbury v. Madison*, 'is, solely, to decide on the rights of individuals.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (internal citation omitted).

An essential aspect of the "Case or Controversy" requirement is that when the individual bringing a lawsuit no longer has a grievance capable of judicial resolution, the basis for exercising the judicial power disappears. Thus, "[i]f an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare*, 133 S. Ct. at 1528 (citation and internal quotation marks omitted).

Article III litigation contrasts sharply with regulation and administrative enforcement. Whereas courts resolve individual claims, it is the Executive Branch that is charged with enforcing the law, without any need for a live "Case or Controversy." This broad power to enforce the law entails many sensitive policy considerations. When an Executive Branch agency decides to bring an enforcement action, it has both the expertise and the responsibility to consider "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the

agency has enough resources to undertake the action at all." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Equally important, when an agency *declines* to bring an enforcement action, it is making a policy decision that lies within the "special province of the Executive Branch." *Id.* at 832. Just as "[t]he police overlook minor infractions of the traffic code," regulatory agencies exercise the power of "discretionary nonenforcement" rather than enforce every technical provision of law to the fullest extent. William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1, 38 (1975); *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk Univ. L. Rev. 881, 897 (1983) (noting the Executive's "ability to lose or misdirect laws" that ought not be fully enforced).

The power to enforce—or not enforce—the law is sufficiently important that it is reserved to officers who are charged with pursuing the public interest, and in doing so are ultimately accountable to the people. *See Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring) ("Liberty requires accountability."); *see also Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."). In fact, the Framers consciously structured the Executive Branch "to ensure that one executive would be accountable for law enforcement choices." Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521, 583 (2005).

Policing the line between Article III "Cases or Controversies" and Article II law enforcement is thus an important separation of powers concern. This Court has recognized that the limits on the judicial power help ensure that Congress may not "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *Lujan*, 504 U.S. at 577 (quoting U.S. Const. art. II, § 3).

The line between litigation and regulatory enforcement is no less important in class actions, which are simply a "species" of "traditional joinder" that "enable[] a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality); *see also Amchem Prods. v. Windsor*, 521 U.S. 591, 625-26 (1997) (representative plaintiff and absent class members must each "possess the same interest and suffer the same injury" (quoting *E. Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403 (1977)) (internal quotation marks omitted)). This procedural device provides no basis for breaking down the division between Article II and Article III responsibilities; it is not a license "to hand a private attorney general's badge to any counsel who wants it." S. Rep. No. 109-14, Class Action Fairness Act of 2005, at 58, *as reprinted in* 2005 U.S.C.C.A.N. 3, 54 (quoting Hon. William T. Coleman before the Advisory Committee on Civil Rules).

Yet without strict adherence to Article III limits, class actions threaten to do just that: empower "private attorneys general" to bring

abstract law enforcement actions. These are law enforcement actions, however, with "[v]irtually none of the checks on executive enforcement discretion." Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781, 807 (2009); *see also* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. Rev. 62, 104 (1990) ("Delegations to private attorneys general . are immune from most external supervision. "). What to an Executive Branch agency would be a poor candidate for enforcement—*e.g.*, a trivial or technical violation subject to disproportionate sanctions—may represent a lucrative settlement opportunity for a private attorney. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting the "risk of 'in terrorem' settlements that class actions entail"); *Shady Grove*, 559 U.S. at 445 n.3 (Ginsburg, J., dissenting) (noting that "pressure to settle may be heightened" in class actions for statutory damages, where there is a "risk of massive liability unmoored to actual injury").

B. An Offer Of Judgment Moots A Putative Class Action.

Mootness doctrine, as an aspect of the Article III "Case or Controversy" requirement, helps ensure that the judiciary is not asked to interfere with the Executive's power to enforce the law. Allowing a plaintiff who has been offered complete relief to nonetheless proceed to represent a class would endorse the sort of private law enforcement action that the separation of powers forecloses.

"[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the cases before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam). Once a plaintiff has been offered everything his lawsuit demands, nothing the court does can "affect [his] rights." If "the defendant unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory," *Genesis Healthcare*, 133 S. Ct. at 1536 (Kagan, J., dissenting), there is no more "lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity." *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (plurality op. of Frankfurter, J.).

Filing a lawsuit as a putative class action does nothing to change this analysis. As this Court recently held in a closely analogous context, "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." *Genesis Healthcare*, 133 S. Ct. at 1529. There is no principled basis for reaching a different result here. Just as an individual plaintiff does not have "a sufficient personal stake . . based on a statutorily created collective-action interest in representing other[s] similarly situated," *id.* at 1530, neither does the claim-aggregation procedure of Rule 23 accord any right or interest in representing a class.

This result follows not just from *Genesis Healthcare*, but more broadly from the separation of powers principles that animate the "Case or Controversy" requirement. An individual without any continuing stake in a dispute, who nonetheless

wishes to prosecute alleged violations of a statute involving *other people*, seeks to perform a quintessentially regulatory function. If someone lacking the traditional interest in a dispute can play the role of private attorney general, significant constitutional protections would be eroded.

The Ninth Circuit and other courts of appeals, however, have departed from these principles, expressing a concern that applying them would permit a "tactic of 'picking off' lead plaintiffs with a Rule 68 offer to avoid a class action." *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011) (quoting *Weiss v. Regal Collections*, 385 F.3d 337, 347 (3d Cir. 2004)). This policy objection is misplaced, and in fact confirms the importance of preventing class actions from becoming regulatory enforcement actions.

When many people are genuinely injured by an allegedly illegal practice, one would expect no shortage of aggrieved plaintiffs to step forward and sue for redress of those injuries. If one plaintiff's claim is resolved and she is no longer able to represent a large class of genuinely injured individuals, the next plaintiff in line can step forward and file suit. If the defendant offers full relief to that plaintiff, then the third plaintiff in line can step forward, and so on. Indeed, once it becomes known that any plaintiff who files a complaint will receive not an answer but a check, anyone with a viable claim would have even more reason to come forward.

To the extent Congress is concerned that suing over small-bore grievances would not be economical outside the context of a class action, it can—and

does—respond with fee-shifting provisions. The Fair Credit Reporting Act, for example, guarantees attorney's fees to a prevailing plaintiff. *See* 15 U.S.C. § 1681n(a)(3). As one court has explained, the fact that "the FCRA requires that a court award a successful plaintiff attorneys' fees dispel[s] the notion that a class action is the only way" to address alleged violations. *Klotz v. Trans Union, LLC*, 246 F.R.D. 208, 217 (E.D. Pa. 2007). In any attempt to "pick off" representatives of a putative FCRA class action, not only would new plaintiffs have every reason to file a claim and perhaps receive their own offers of judgment, but they will also likely be able to find an attorney to pursue their claims and receive compensation for doing so.

Because of these dynamics, in any putative class action that genuinely seeks to aggregate the claims of many aggrieved parties, a strategy of offering judgment to the named plaintiff is inherently self-limiting. Rather than enable a defendant to escape liability for legitimate claims, serial offers of full judgment will only encourage injured parties to join the chorus asking for their own complete relief.

If this does *not* happen—if an enterprising class action attorney is unable to persuade a single additional person to file a lawsuit, despite the fact that the first plaintiff was quickly paid in full—that is a telling sign about the case. It suggests that there is not in fact a large group of aggrieved individuals, each possessing a bona fide claim. An offer of judgment, in short, allows a defendant to put its money where its mouth is, predicting that the case is genuinely an insubstantial nuisance that the

offer could fully resolve. If the defendant guesses wrong, and there *has* been a substantial violation that has truly injured many individuals, the "tactic" would backfire: it would encourage more lawsuits, signal a willingness to pay, and likely increase the sum of any ultimate settlement.

Offers of judgment thus help draw a line between a bona fide class action and an impermissible attempt by private parties to enforce the law. If a named plaintiff is "picked off" and no class action attorney can identify a single aggrieved individual to take his place, that is not a case in which the defendant won on a technicality. It is instead a case in which a would-be "private attorney general" was prevented from using the federal courts to threaten massive penalties and extract a lucrative settlement based on abstract allegations of a violation of the law. Such actions have no place in an Article III court—and certainly do not warrant the protection of a special exception to mootness.

II. As Litigation Under The FCRA Illustrates, Offers Of Judgment Help Preserve The Distinction Between Regulation And Litigation.

The consumer data industry's experience demonstrates the need to maintain the distinction between regulation and law enforcement, on the one hand, and Article III litigation, on the other.

Consumer reporting is both a profoundly important aspect of the economy and a massive and complex undertaking. As Congress has recognized, the consumer reporting system is an "elaborate mechanism" on which "[t]he banking system is

dependent." 15 U.S.C. § 1681(a)(1), (2). To facilitate the operation of this system, credit-reporting agencies ("CRAs") in the United States maintain files concerning more than 200 million adults, and each month receive information on more than 1.3 billion "trade lines" (an industry term for accounts that are included in a credit report). Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System*, at 3 (Dec. 2012), *available at* http://tinyurl.com/CFPB-CRA [hereinafter "Key Dimensions"]. As one court has observed, a CRA can "process[] over 50 million updates to trade information each day." *Sarver v. Experian Info. Sols.*, 390 F.3d 969, 972 (7th Cir. 2004). CRAs receive this information from approximately 10,000 data "furnishers." Key Dimensions, *supra*, at 14.

CRAs, furnishers of consumer data, and users of credit reports are all subject to a detailed regulatory scheme enacted by the FCRA. *See* Key Dimensions, *supra*, at 13 ("All of these participants have defined roles with specific obligations under the FCRA."). The FCRAs requirements range from the broad—*e.g.*, requiring CRAs to "follow reasonable procedures to assure maximum possible accuracy" of information, 15 U.S.C. § 1681e(b)—to the detailed and technical—*e.g.*, requiring CRAs to post toll-free telephone numbers for consumers, 15 U.S.C. § 1681j(a). And as this Court has observed, the FCRA's requirements are often expressed in "less-than-pellucid statutory text." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007).

The FCRA is actively and aggressively enforced by public regulatory agencies. The Federal

Trade Commission ("FTC") "has brought over 30 actions to enforce the FCRA against CRAs, users of consumer reports, and furnishers of information to CRAs," and in 2013 announced that "[v]igorous enforcement of the FCRA is a high priority for the Commission." The Accuracy and Completeness of Consumer Credit Reports: Prepared Statement of the Federal Trade Commission, at 5, Hearing before the U.S. Sen. Comm. on Commerce, Sci. & Transp., Subcomm. on Consumer Protection, Prod. Safety & Ins. (May 7, 2013).

With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376 (2010), the FTC has been joined by the Consumer Financial Protection Bureau (CFPB) as an enforcer of the FCRA. The CFPB has focused on companies that furnish data to CRAs, noting that it "will prioritize examinations and other actions on the basis of risks posed to consumers." Consumer Financial Protection Bureau, CFPB Bulletin 2013-09, at 2 (Sept. 4, 2013), *available at* http://tinyurl.com/CFPB2013-09. In the summer of 2015, the CFPB also noted its "reviews of the reasonableness of methods and processes used by certain CRAs to assure maximum possible accuracy of consumer reports they produce." Consumer Financial Protection Bureau, *Supervisory Highlights*, at 5 (Summer 2015), *available at* http://tinyurl.com/CFPB-Summer2015. The CFPB praised CRAs' "highly knowledgeable staff and management that oversee complex processes for maintaining consumer credit data." *Id.* It also announced efforts to remedy alleged "weaknesses"

through, for example, "implementation timelines to establish quality controls." *Id.* at 6-7.

Few would say that the CFPB has not been an aggressive enforcer of the law. But as an Executive Branch agency, it is not constrained by Article III requirements, not limited to the blunt tool of litigation, and not driven by a profit motive. Accordingly, the agency has set priorities based on "risks posed to consumers," and has sought to resolve perceived problems in forward-looking ways without necessarily resorting to large enforcement actions.

Unsurprisingly, private attorneys seeking to enforce the FCRA have approached the issues in a different way. Because CRAs, data furnishers, and users of consumer reports necessarily deal in large quantities of information, and because the FCRA offers uncapped statutory damages for violations, class action attorneys are able to threaten massive damages for even trivial alleged violations. One such action is already before the Court this Term in *Spokeo, Inc. v. Robins*, No. 13-1339, in which the plaintiff seeks to recover billions of dollars on behalf of a class comprising "millions." Br. for Pet'r in *Spokeo* at 33-34 (July 2, 2015). That is par for the course in cases against CRAs. *See, e.g.*, *Trans Union LLC v. Fed. Trade Comm'n*, 536 U.S. 915 (2002) (Kennedy, J., dissenting from the denial of certiorari) (noting a "series of class actions brought under the FCRA" against Trans Union LLC, "allegedly on behalf of the 190 million individuals in [its] database," with "potential liability approaching $190 billion").

Such actions are filed with increasing frequency. As the Chief Justice noted in his 2009

report on the state of the judiciary, "[f]ilings of cases involving consumer credit, such as those filed under the Fair Credit Reporting Act, increased 53% (up 2,143 cases), fueled in part by the current economic downturn." *2009 Year-End Report on the Federal Judiciary*, at 3 (Dec. 31, 2009), *available at* http://tinyurl.com/CJ2009Rept. While the economic climate has improved, the litigation climate has not—in just the first four months of 2014, 802 FCRA lawsuits were filed. *See* Web Recon, *Debt Collection Litigation & CFPB Complaint Statistics, April 2014*, *available at* http://tinyurl.com/FCRA2014Stats. Turning the separation of powers on its head, Article III litigation under the FCRA has overshadowed regulation and enforcement by the Executive Branch.

Considering the ability of a class action attorney to threaten statutory damages up to $1,000 for each member of a class numbering into the millions, *see* 15 U.S.C. § 1681n, it is disturbingly easy to lodge a FCRA accusation, and difficult to fend off even spurious charges. Such lawsuits typically allege broadly that a CRA has failed to follow "reasonable procedures" to assure the "maximum possible accuracy" of credit reports. 15 U.S.C. § 1681e(b). Paradoxically, a FCRA case can be tailor-made to *avoid* difficult class certification issues by disclaiming any effort to recover based on actual injuries, and seeking to recover class-wide statutory damages irrespective of individualized questions of harm. And after certification, settlement is all but inevitable. As Judge Wilkinson commented about the FCRA, "[o]nce a class is certified, a statutory damages defendant faces a bet-the-company

proposition and likely will settle rather than risk shareholder reaction to theoretical billions in exposure even if the company believes the claim lacks merit." *Stillmock v. Weis Mkts.*, 385 F. App'x 267, 281 (4th Cir. 2010) (Wilkinson, J., concurring) (quoting Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104 (2009)).

This is the context within which FCRA defendants consider whether to offer the plaintiff complete relief at the outset of the litigation. If a CRA were engaged in truly harmful misconduct affecting a class of millions, one would not expect an attempt to "pick off" a single class representative to have any impact on the ultimate viability of a class action. Class action attorneys could easily identify a long line of prospective plaintiffs, each one demanding full relief *plus* attorney's fees. *See* 15 U.S.C. § 1681n(a)(3); *Klotz*, 246 F.R.D. at 217. At some point, the defendant would be compelled to reckon with the putative class rather than make serial offers of judgment on generous terms. Yet if that long line of new plaintiffs—out of a million-strong class—does *not* materialize, that itself is telling. Such a class action, which in the case of CRAs may quite literally be brought on behalf of most of the general public, *see Trans Union LLC*, 536 U.S. 915, is nothing more than private law enforcement. But it is law enforcement driven by private lawyers' pursuit of lucrative settlements rather than an Executive Branch agency's expertise, accountability, and discretion.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Petitioner's brief, the decision of the court of appeals should be reversed.

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CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR & PSC—THE VOICE OF THE GOVERNMENT SERVICES INDUSTRY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

DRI—The Voice of the Defense Bar ("DRI") is an organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of civil litigation defense attorneys, addressing substantive, procedural, and policy issues germane to the defense of civil litigation, and improving the civil justice system. To help accomplish these objectives, DRI participates as *amicus curiae* in carefully selected appeals concerning subjects that are particularly important to civil defense attorneys, their clients, and the conduct of civil litigation. Achieving fairness in class-action litigation is one of DRI's most important objectives. For this reason, DRI has filed *amicus* briefs in many Supreme Court cases involving the justiciability, certification, conduct, or reviewability of class-action suits or other types of representative or collective litigation, including in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541

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[1] In accordance with Supreme Court Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or part, and that no party's counsel, no party, and no person other than *amici*, their members, and their counsel, made a monetary contribution intended to fund preparation or submission of this brief. Petitioner's and Respondent's counsel have lodged with the Clerk letters granting blanket consent to the submission of *amicus* briefs.

(2011). Preserving immunities and other pretrial defenses that are available to defendants in federal or state-law damages litigation is another subject of critical importance to DRI and its members.

The Professional Services Council—The Voice of the Government Services Industry ("PSC")—is the national trade association for the government professional and technology services industry. PSC's more than 380 member companies represent small, medium, and large businesses that provide federal departments and agencies with a wide range of professional and technology services, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, and environmental services. Together, the association's members employ hundreds of thousands of Americans in all 50 states. Many PSC member companies directly support the U.S. Government through contracts with the Department of Defense and other national security or humanitarian-related federal agencies, both domestically and abroad. The federal government's ability to rely upon PSC's members for many types of essential military and non-military-related services would be seriously impaired if derivative sovereign immunity and other dispositive pretrial defenses were unavailable to protect contractors from liability suits in connection with performance of government-authorized work.

* * *

Amici and their members have a substantial interest in the class-action mootness and derivative

sovereign immunity questions presented by this appeal.

1. Despite efforts at class-action reform, the ongoing proliferation of class-action suits—and the multi-million dollar, pretrial settlements that class counsel frequently exact from corporate defendants—threaten the economic well-being, stability, and reputation of virtually every American business, and in turn, the nation's economy. The attorney-fee bonanza that class counsel seek includes putative "no-injury" class actions alleging widespread, but as here, inadvertent violations of federal privacy or financial protection statutes such as the Telephone Consumer Protection Act ("TCPA"), which make statutory damages available to individual claimants without requiring proof of actual harm. *See generally The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. (2015) (Statement of John Parker Sweeney, President, DRI—The Voice of the Defense Bar).[2]

The question of whether a no-injury or other class action can be certified under Federal Rule of Civil Procedure 23—and thus proceed to settlement or trial—where an individual named plaintiff has received a pre-certification offer of complete relief not

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[2] *Available at* http://tinyurl.com/kvmjm5v (last visited July 13, 2015).

only implicates the Article III case-or-controversy requirement, but also goes to the heart of class-action fairness. This is particularly true where putative class actions arise under statutes which, like the TCPA, are intended to redress individual claims by providing modest, statutorily specified damages.

2. As this appeal illustrates, government contractors that provide services for the Department of Defense or other federal departments or agencies are among the class-action litigation industry's targets. Subjecting a federal government contractor to the often astronomical cost of settling class-action litigation, or to the very substantial burdens, risks, and expense of defending such suits, is particularly unjust where, as here, the litigation relates to performance of contractual services for the federal government—services that not only were requested, authorized, directed, accepted, and paid for by the government, but also, if performed by government rather than contractor personnel, would be insulated from suit by sovereign immunity.

Derivative sovereign immunity is predicated on the principle that a federal government contractor should not be subjected to private party damages litigation, much less liability, for "executing [the] will" of the government. *Yearsley v. Ross Constr. Co.*, 309 U.S. 18, 21 (1940). As this Court more recently explained in an analogous context, government contactors should not be "left holding the bag." *Filarsky v. Delia*, 132 S. Ct. 1657, 1666 (2012). Allowing private parties to pursue damages claims against government contractors arising out of the services that they perform for the U.S. military and

numerous other federal departments and agencies—damages claims that sovereign immunity bars from being brought against the government itself—would undermine the federal procurement process. Permitting such litigation would deter contractors from participating in the expanding universe of government work and/or increase the government's costs of using contractors for such work. For these reasons, *amici* urge the Court to reaffirm a broad and robust derivative sovereign immunity doctrine.

SUMMARY OF ARGUMENT

This appeal affords the Court the opportunity to reaffirm important Article III case-or-controversy principles that undergird the nation's civil justice system and derivative sovereign immunity principles that are essential to the operation of the federal government, including the U.S. military.

Class-action litigation has become rampant against American business. The increasing number of federal privacy and financial protection statutes, such as the TCPA, which provide individuals with statutorily specified damages for inadvertent violations and require no showing of actual harm, has fueled the class-action plaintiff bar's onslaught. The present litigation illustrates what TCPA litigation has become—a big-time, multi-million dollar, putative class action encompassing 100,000 individuals who allegedly received from a U.S. Navy contractor, without their consent, a single, inadvertent, entirely harmless, 29-word recruitment-related text message (among *billions* of text messages sent and received within the United States every day).

Well-settled mootness principles, derived from the Article III case-or-controversy requirement, should apply where, as here, the sole-named plaintiff in a putative class action has been offered complete relief prior to class certification, but for some reason attempts to proceed with the litigation. Such a putative class action should be treated as moot for the same reasons that this Court in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), held that a Fair Labor Standards Act ("FLSA") collective-action suit was mooted where the plaintiff received (and declined to accept) an offer of complete relief. The case for mootness is even stronger in the context of class actions. This is because class-certification requirements, such as the adequacy-of-representation prerequisite established by Federal Rule of Civil Procedure 23(a)(4), cannot be satisfied by a plaintiff who has received an offer of complete relief, and thus, no longer has a personal stake in his own litigation. Because mootness is a constitutional, not contractual, principle, failure to accept such an offer does not alter the case-or-controversy analysis.

The unfairness of allowing a multi-million dollar class action to proceed without a named plaintiff who has a personal stake in the litigation is exacerbated where, as here, the defendant is a federal government contractor whose alleged violation of a federal privacy protection statute arose entirely out of services that the U.S. military requested and supervised. If the Navy had performed those services itself (i.e., utilized uniformed personnel to send out the exact same text message to the same individuals), Respondent Gomez could not have successfully pursued a TCPA suit, either on behalf of

himself or a putative class. Such a suit would be barred by sovereign immunity. The same federal interests that underlie sovereign immunity, such as enabling the Department of Defense and other federal departments and agencies to get their work done without the fear, burden, or cost of damages litigation, justify derivative sovereign immunity for federal contractors that help the government carry out its work. Indeed, the need for derivative sovereign immunity is crucial in view of the federal government's extensive reliance upon contractors both in foreign combat theaters and throughout the homeland. Limiting derivative sovereign immunity to the domestic public works scenario involved in the seminal but 75 year-old *Yearsley* opinion would not come close to serving the federal government's procurement-related interests in the Twenty-First Century.

Insofar as the Court addresses derivative sovereign immunity in this appeal, it should hold that derivative sovereign immunity applies where, as here, a damages claim arises out of services performed by a federal government contractor, and a similar claim, if filed directly against the United States, would be barred by sovereign immunity. The derivative sovereign immunity afforded to contractors under this standard is coextensive with—no broader or narrower than—the federal government's own sovereign immunity.

ARGUMENT

I. The Court Should Hold That A Putative Class Action Becomes Moot If The Named Plaintiff's Individual Claim Becomes Moot Prior To Class Certification

A. Well-Settled Principles Govern The Class-Action Mootness Question Presented By This Appeal

As was the case with the FLSA collective-action mootness issue that this Court addressed in *Genesis Healthcare*, "[a] straightforward application of well-settled mootness principles compels [the] answer" to the class-action mootness question presented here. 133 S. Ct. at 1529. In short, the putative TCPA class-action suit filed by Respondent Gomez should be dismissed as moot because having received Petitioner Campbell-Ewald Company's pre-certification offers of complete relief, his individual claim for relief is moot.

"Article III, § 2, of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Id.* at 1528. "To enforce this limitation, [the Court] demand[s] that litigants demonstrate a 'personal stake' in the suit." *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009)). The "personal stake" requirement is continuous: "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v.*

Newkirk, 422 U.S. 395, 401 (1975)); *see also Genesis Healthcare*, 133 S. Ct. at 1528 (same). Thus, "the critical question under Article III is whether the litigant *retains* the neces ary personal stake." *Camreta*, 131 S. Ct. at 2029 (emphasis added). Under the Court's well-established conditions for mootness, a personal stake no longer exists where, as here, the plaintiff cannot continue to demonstrate that his alleged injury "'will be redressed by a favorable decision.'" *Id.* at 2028 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Campbell-Ewald offered Gomez complete monetary and injunctive relief in the form of *both* an offer of judgment under Federal Rule of Civil Procedure 68 and a separate, parallel settlement offer. *See* Pet. App. 52a-61a. Although Gomez did not accept either of those offers, they were an "intervening circumstance [that] deprive[d] the plaintiff of [the] 'personal stake in the outcome of the lawsuit'" needed to satisfy the Article III case-or-controversy requirement. *Genesis Healthcare*, 133 S. Ct. at 1528 (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990)). More specifically, the offers of complete relief entirely extinguished Gomez's dispute with Campbell-Ewald, and consequently, his ability to show that his alleged "injury" under the TCPA needs to be redressed by a favorable judicial decision. As a result, "the action no longer can proceed and must be dismissed as moot." *Ibid.*

According to Justice Kagan's dissenting opinion in *Genesis Healthcare*, "[a]n unaccepted settlement offer—like any unaccepted *contract* offer—is a legal nullity, with no operative effect." 133 S. Ct. at 1533

(Kagan, J., dissenting) (emphasis added). But this Court's case-or-controversy jurisprudence makes it clear that mootness is a matter of constitutional law, not contract law. The Article III case-or-controversy requirement "ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes." *Id.* at 1528 (citing *Summers*, 555 U.S. at 493). "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. [I]t is not enough that a dispute was very much alive when suit was filed " *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990).

A plaintiff who has been offered all of the relief that his complaint demands (or that he is statutorily entitled to receive) no longer can demonstrate that he has an "actual," "concrete," or "ongoing" dispute (i.e., a "case or controversy") with the defendant. Regardless of whether an offer of complete relief is accepted, the *tendering* of the offer transforms a case into a proceeding where "the issues presented are no longer 'live' [and] the parties lack a legally cognizable interest in the outcome." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)); *see also Genesis Healthcare*, 133 S. Ct. at 1529 n.4 (noting that courts of appeals on both sides of the Rule 68 offer-of-complete relief mootness issue "have recognized that a plaintiff's claim may be satisfied even without the plaintiff's consent").

Indeed, the process of "adjudicating" Respondent Gomez's claim against Campbell-Ewald despite that company's offers of complete relief no longer would

involve "'questions presented in an adversary context '" *U.S. Parole Comm'n*, 445 U.S. at 396. Such a mock proceeding would violate the case-or-controversy requirement by producing what would be tantamount to an advisory opinion. *See generally Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009) (the Article III case-or-controversy requirement restricts judicial power "to the traditional role of Anglo-American courts, which is to redress actual injury caused by violation of law"); *Lewis*, 494 U.S. at 477 ("Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them and confines them to resolving real [questions] as distinguished from an opinion advising what the law would be ") (internal quotation marks omitted).

The fact that Respondent's Complaint contained class allegations, *see* Pet. App. 3a, does not alter this result. "[R]espondent's suit became moot when [his] individual claim became moot, because [he] lacked any personal interest in representing others in this action." *Genesis Healthcare*, 133 S. Ct. at 1529. "[T]he mere presence of [class-action] allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." *Ibid.* And since Campbell-Ewald's settlement offers were made prior to a motion for class certification, *see* Pet. at 5, this is not a case where "a putative class acquires an independent legal status once it is certified under Rule 23." *Genesis Healthcare*, 133 S. Ct. at 1530 (distinguishing *Sosna v. Iowa*, 419 U.S. 393 (1975) and *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388). As in *Genesis Healthcare*, the offers of complete relief

not only mooted Gomez's individual claim, but also left him with "no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve [his] suit from mootness." *Id.* at 1532.

B. Mootness Is Even More Compelling Here Than It Was In *Genesis Healthcare*

Genesis Healthcare involved a plaintiff's wage-and-hour suit for FLSA damages filed "on behalf of herself and 'all other persons similarly situated.'" 133 S. Ct. at 1527. The plaintiff failed to accept a Rule 68 offer of judgment that "afforded [her] complete relief." *Id.* at 1528. Assuming, without deciding, that the Rule 68 offer mooted the plaintiff's individual claim, the Court held that the plaintiff's putative FLSA "collective-action" suit was mooted too. *Id.* at 1529.

The reasons why a putative (i.e., not-yet-certified), Rule 23 class action should be deemed moot where, as here, the named plaintiff's claim is moot, are even more convincing:

1. The FLSA provision at issue in *Genesis Healthcare* "gives employees the right to bring a private cause of action on their own behalf *and on behalf of 'other employees similarly situated'* for specified violations of the FLSA." *Id.* at 1527 (quoting 29 U.S.C. § 216(b)) (emphasis added); *see also id.* at 1527 n.1, 1528, 1530, 1532 (referring to the "conditional certification" procedure employed by some courts in connection with § 216(b) collective actions). Despite the plaintiff's statutory right under

the FLSA to bring a "collective action" on behalf of herself and other employees, the Court held that her collective-action suit was moot because her individual claim was moot. *Id.* at 1529, 1532.

The case for mootness of Respondent Gomez's suit is even more compelling because unlike an FLSA collective-action plaintiff, Gomez has no statutory right to bring a representative action. The TCPA's private-right-of-action provision merely authorizes "[a] person or entity" to bring an individual action for statutorily specified damages. 47 U.S.C. § 227(b)(3); *compare id.* § 227(g)(1) (authorizing "the attorney general of a State [to] bring a civil action on behalf of its residents"). To proceed as a class action, Gomez's suit would have to satisfy the class-action prerequisites and additional certification requirements established by Federal Rule of Civil Procedure 23. Because a class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979), Rule 23 "imposes stringent requirements for certification." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013); *see also Genesis Healthcare*, 133 S. Ct. at 1532 ("Whatever significance 'conditional certification' may have in § 216(b) [FLSA] proceedings, it is not tantamount to class certification under Rule 23."). If an offer of complete relief to the named plaintiff moots an FLSA suit despite the statutory right to bring a collective action, an offer of complete relief moots a putative class action, where there is no analogous statutory right and Rule 23 certification prerequisites must be met.

One of those class-certification prerequisites is that the named plaintiff "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997) ("[A] class representative must be part of the class and possess the same interest as the class members.") (internal quotation marks omitted). A plaintiff who has received an offer of complete relief—and thus whose individual claim is moot because he no longer has a personal stake in the litigation—does not "possess the same interest" as the class, and therefore, cannot satisfy the Rule 23(a)(4) prerequisite for certification. Further, "[c]lass counsel must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4) ("Duty of Class Counsel"). Fulfilling that duty would be problematic where the prospective class counsel's named plaintiff client—unlike members of the putative class—has received an offer of complete relief.

"The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods.*, 521 U.S. at 625. The conflicting interests between a plaintiff whose individual claim is mooted by an offer of complete relief and the interests of putative class members (who have received no such offer)—as well as the conflicting ethical duties that a prospective class counsel encounters in such a situation—are important reasons why a putative class action should be treated as moot where the named plaintiff's individual claim is moot.

2. There should be even less concern here that a holding of mootness would frustrate "efficient resolution of common claims" than there was in *Genesis Healthcare*, 133 S. Ct. at 1531. Unlike the FLSA's explicit authorization for collective actions, *see* 29 U.S.C. § 216(b), the "procedural device of a Rule 23 class action," *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 331 (1980), does not create or expand any substantive right of action; instead, it merely "regulates how claims are processed." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407-08 (2010) (discussing the limitations imposed by the Rules Enabling Act, 28 U.S.C. § 2072(b)).

Moreover, as discussed above, the TCPA's private-right-of-action provision, 47 U.S.C. § 227(b)(3), contains no substantive right to file a collective or representative action. Indeed, although the TCPA "has become the statute du jour for the plaintiffs' class action bar," that is "far from [the] original congressional vision." Lesli C. Esposito & Brian J. Boyle, *TCPA Enforcement and Compliance*, For the Defense 65 (June 2015). When the TCPA's private-right-of-action provision was being considered by the Senate in 1991, the bill's sponsor, Senator Hollings, expressed his "hope that States will make it as easy as possible for consumers to bring such actions, *preferably in small claims court*." 137 Cong. Rec. S16204-01 (Nov. 7, 1991) (emphasis added). Senator Hollings added that "[s]mall claims court or a similar court would allow the consumer to appear before the court *without an attorney*. The amount of damages in this legislation is set to be fair

to both the consumer and the telemarketer." *Ibid.* (emphasis added).

Respondent's class-action suit represents an effort to transmogrify the individual, modest, attorney-less, small claims-court proceeding contemplated by § 227(b)(3) into a gargantuan money-making machine for creative class-action lawyers who hope to cash-in on inadvertent mistakes made by companies trapped by the every-increasing challenges of complying with the TCPA and other federal privacy and financial protection statutes.[3] Rather than filing a small claim seeking the maximum, statutorily specified award of $500 for the obviously inadvertent, innocuous, one-time, U.S. Navy recruitment-related text message that Respondent Gomez alleges he received (at the age of 40) without his consent, he filed in federal court—through prospective class counsel—litigation seeking potentially hundreds of millions of dollars in collective damages on behalf of a putative class of 100,000 individuals who allegedly received the same message without prior consent. *See* Pet. at 5. There is no reason to be concerned, therefore, that holding this type of misguided class–action suit moot would

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[3] *See, e.g.*, Federal Communications Commission, FCC Strengthens Consumer Protections Against Unwanted Calls and Texts (June 18, 2015), *available at* https://www.fcc.gov/document/fcc-strengthens-consumer-protections-against-unwanted-calls-and-texts (last visited July 20, 2015) (discussing FCC 15-72, TCPA Omnibus Declaratory Ruling & Order (July 10, 2015), *available at* https://www.fcc.gov/document/tcpa-omnibus-declaratory-ruling-and-order (last visited July 20, 2015)).

undermine either the TCPA or the class-action procedural mechanism.

C. A Ruling That Respondent's Suit Is Moot Would Help To Maintain the Integrity Of The Class-Action Procedure

The TCPA is one of many federal privacy or financial protection statutes that enable an individual to obtain damages (often an amount specified by statute) for inadvertent violations without any requirement to demonstrate that actual harm was suffered. *See* Petition For a Writ of Certiorari, *Spokeo, Inc. v. Robins*, No. 13-1339, at 16-18 & 18 n.17 (May 2014) (listing statutes); Statement of John Parker Sweeney, President, DRI—The Voice of the Defense Bar, *supra* at 3 (same).

Class-action lawyers have seized upon these statutes as a lucrative source of legal fees (typically 25%-30% of class damages). As is the case here, "while few if any of the putative class members have suffered any actual harm, the sheer number of potential class members" in such a "no-injury" class action can cause the corporate defendant—here a federal government contractor—to "face catastrophic liability for inadvertent and technical violations." *Sweeney Statement*, *supra* at 3, 4, 5. If the class is certified, the pressure upon the defendant to settle is enormous. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1206 (2013) (Scalia, J., dissenting) ("Certification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high."); *id.* at 1212 n.9 (2013)

(Thomas, J., dissenting) (referring to "*in terrorem* settlement pressures" following class certification); Fed. R. Civ. P 23(f) advisory comm. note (1998) ("An order granting certification may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."); *see also Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (discussing the reasons why almost all class actions are settled prior to trial).

The defendant in a putative, no-injury, statutory damages class action has every reason to settle with the named party plaintiff or plaintiffs as early in the case as possible, and thereby avoid the risk of having to pay millions of dollars to settle the suit after the putative class is certified. In fact, the more modest the amount of damages specified by a statute (e.g., $500 per violation specified by the TCPA), the more sense it makes to settle with the named plaintiff. While prospective class counsel are apt to criticize this so-called "pick-off" strategy, the Court indicated in *Genesis Healthcare* that it is has no general concern about a defendant that wishes to settle with the named plaintiff in a putative class action prior to class certification and thereby avoid the risks and costs of class litigation. *See* 133 S. Ct. at 1531-32.

The putative class at issue here purports to satisfy the class-certification criteria of Federal Rule of Civil Procedure 23(b)(3). *See* Pet. App. 49a. That Rule is intended to "'achieve economies of time, effort, and expense without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem Prods.*, 521 U.S. at 615 (quoting Rule 23(b) advisory comm. note (1966)). Allowing a class-action

to proceed where the sole named plaintiff has received offers of complete relief not only would offend the Article III case-or-controversy requirement and this Court's mootness principles, but also would bring about undesirable results for both the plaintiff (who would have to endure the risks and burdens of litigation in an attempt to win what he already has been offered vountarily) and the defendant (which would encounter the risk of a massive settlement or judgment). This Court, therefore, should hold that a putative class action is moot, where, as here, the plaintiff's individual claim is mooted by an offer of complete relief prior to class certification.

II. Derivative Sovereign Immunity Should Bar Any Contract Performance-Related Claim Against A Government Contractor If Sovereign Immunity Would Bar A Similar Claim Against The United States

A. Derivative Sovereign Immunity Serves The Same Important Federal Interests As Sovereign Immunity

"It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). This is not a matter of "the king can do no wrong." Instead, "[s]overeign immunity exists because it is in the public interest to protect the exercise of certain governmental functions." *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000); *see, e.g.*, 28 U.S.C. § 2680(a) ("discretionary function" exception to Federal Tort Claims Act ("FTCA") waiver of sovereign immunity);

Boyle v. United Technologies Corp., 487 U.S. 500, 505 n.1 (1988) ("[T]he liability of independent contractors performing work for the Federal Government, like the liability of federal officials, is an area of uniquely federal interest.").

The federal government's (and the public's) interests also are served by recognizing *derivative* sovereign immunity. Indeed, in view of the government's extensive reliance on private sector contractors for an enormous variety of services, derivative sovereign immunity is an essential adjunct to sovereign immunity. "[C]ourts have extended derivative immunity to private contractors," because "[i]mposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work." *Butters*, 225 F.3d at 466. "If absolute immunity protects a particular governmental function it is a small step to protect that function when delegated to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions." *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1447-48 (4th Cir. 1996).

The relationship between the federal government and its contractors is so intertwined, it often can be described as symbiotic. *See generally Dobyns v. E-Sys., Inc.*, 667 F.2d 1219, 1222 (5th Cir. 1982) (discussing a "'symbiotic relationship' in which the government has 'so far insinuated itself into a position of interdependence (with a private entity) that it must be recognized as a joint participant in the challenged activity '") (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)).

That certainly is the case with the Department of Defense, where "the military finds the use of civilian contractors in support roles to be an essential component of a successful war-time mission." *Lane v. Halliburton*, 529 F.3d 548, 554 (5th Cir. 2008); *see also Moshe Schwartz & Jennifer Church Cong. Research Serv.*, R43074, *Dept. of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress* (May 2013) (indicating that contractor personnel accounted for at least half of the U.S. total force in Iraq and Afghanistan). In addition to the U.S. military's reliance on contractors for war-zone logistical support, Defense Department contractors provide crucial, national security-related services such as information technology and data analytics for the Defense Intelligence Agency and project management and oversight for the Defense Threat Reduction Agency. "[R]eliance on contractor expertise will become only more necessary as warfare becomes more technologically demanding." *Al Shimari v. CACI Int'l Corp.*, 679 F.3d 205, 240 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting).[4]

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[4] The Defense Department's prevalent use of cost-reimbursement contracts, which generally require the government to reimburse a contractor for third-party liabilities not compensated by insurance, fuses the government/contractor identity of interests even more. *See* Br. of the Professional Services Council as *Amicus Curiae* In Support of Petitioner, *Kellogg Brown & Root Servs., Inc. v. Harris*, No. 13-817 (Feb. 2014) (discussing procurement regulations requiring the United States to indemnify cost-reimbursement contractors for third-party liability costs).

A multitude of additional federal departments and agencies also rely on contractors for a vast array of professional and technology services. For example, federal contractors provide personal security and program management services for the Department of Homeland Security, technical advisory services for the Department of State and the Agency for International Development, medical services for the Department of Veterans Affairs, response and recovery services for the Federal Emergency Management Agency, and emergency preparedness and response services for the Department of Health and Human Services.

Without derivative sovereign immunity, performance of many federal government contractor services, including but not limited to combat-theater support, would leave contractors vulnerable to private damages suits—*especially* since sovereign immunity would protect the government from being sued for authorizing those services. For example, in the event of a cybersecurity breach, a contractor that performs information technology and consulting work at the direction of the Department of Homeland Security, Central Intelligence Agency, or National Security Agency could find itself the target of damages litigation under federal privacy protection statutes even though the government cannot be sued due to sovereign immunity. Or a contractor that provides seized property services, such as storage of explosives or other hazardous materials, at the direction of the Department of the Treasury or the Department of Homeland Security, could be sued for personal injury or death stemming from an accident, even though the government cannot be sued.

Assuming that the contractor acted within the scope of its contract, derivative sovereign immunity should apply since sovereign immunity would bar a similar suit against the government.

Because the working relationship between the federal government and its most vital contractors is virtually seamless, derivative sovereign immunity essentially functions as a shared immunity with the United States. As a result, if sovereign immunity bars a particular type of suit against the federal government (e.g., a state-law personal injury suit arising out of a governmental discretionary function; a statutory damages suit alleging a violation of the TCPA or other federal privacy or financial protection statute), derivative sovereign immunity should bar the same type of suit against a government contractor that acts within its federally delegated, contractual authority.

B. Derivative Sovereign Immunity Is Rooted In, Not Limited By, *Yearsley*

"The concept of derivative sovereign immunity stems from the Supreme Court's decision in *Yearsley v. W.A. Ross Construction Co.* " *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 342 (4th Cir. 2014), *cert. denied sub nom. KBR, Inc. v. Metzgar*, 135 S. Ct. 1153 (2015) (citing *Yearsley*, 309 U.S. 18 (1940)); *see also McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1343 (11th Cir. 2007) (same). In *Yearsley* the Court "rejected an attempt by a landowner to hold a construction contractor liable under state law for the erosion of 95 acres caused by the contractor's work in constructing dikes for the Government." *Boyle*, 487 U.S. at 506. The Court held in *Yearsley* that "if [the]

authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." *Yearsley*, 309 U.S. at 20-21.

Although *Yearsley* does not explicitly refer to derivative sovereign immunity, courts have "recognized, based on *Yearsley*, 'that contractors acting within the scope of their employment for the United States have derivative sovereign immunity.'" *In re KBR, Inc.*, 744 F.3d at 343 (quoting *Butters*, 225 F.3d at 466)); *see also Adkisson v. Jacobs Eng'g Grp., Inc.*, No. 14-6207, 2015 WL 3463032, at *4 (6th Cir. June 2, 2015), *pet. for reh'g denied* (July 7, 2015) ("Over the years circuits have recognized the concept of immunity for government contractors based on *Yearsley*."); *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 204 (5th Cir. 2009) (holding that contractor defendants "are entitled to government contractor immunity under *Yearsley*"); *In re World Trade Center Disaster Site Litig.*, 521 F.3d 169, 196 (2d Cir. 2008) ("Derivative immunity was first extended to private contractors in *Yearsley*, where the contractor was working pursuant to the authorization and direction of the federal government and the acts of which the plaintiff complained fell within the scope of those government directives."); *McMahon*, 502 F.3d at 1343 ("Since *Yearsley*, courts have recognized claims of derivative sovereign immunity in a variety of contexts."); *Myers v. United States*, 323 F.2d 580 (9th Cir. 1963) (citing and applying *Yearsley*)); *see also Mangold*, 77 F.3d at 1448 (citing *Boyle*) ("Extending immunity to private

contractors to protect an important government interest is not novel.").

In *Boyle* this Court "relied on [its] discussion of derivative sovereign immunity in *Yearsley*," Brief for the United States as Amicus Curiae, *KBR, Inc. v. Metzgar*, No. 13-1241, at 19 (Dec. 2014), and explained that the "federal interest justifying" *Yearsley* is the "interest in getting the Government's work done." *Boyle*, 487 U.S. at 505, 506. That compelling, federal procurement-related interest "is implicated even though [a] dispute is one between private parties." *Id.* at 506. This is because "[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline [the government-specified contract] or it will raise its price. Either way, the interests of the United States will be directly affected." *Id* at 507; *see also id.* at 511-12 ("The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself ").[5]

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[5] *Boyle*, a state-law wrongful death suit involving design and procurement of military equipment, established what is commonly referred to as the "government contractor defense." Although the *Boyle* government contractor defense draws upon the FTCA discretionary function exception, *see Boyle*, 487 U.S. at 511 (discussing 28 U.S.C. § 2680(a)), the Ninth Circuit correctly noted here that *Boyle* established what "is fundamentally a pre-emption" defense applicable to state-tort claims. Pet. App. 17a; *see Boyle*, 487 U.S. at 507 ("Displacement will occur only where a significant conflict exists between an identifiable federal policy or interest and the [operation] of

In its opinion below, the Ninth Circuit too recognized "the seventy-year history of the *Yearsley* doctrine," but erroneously indicated that it is a "narrow rule regarding claims arising out of property damage caused by public works projects." Pet. App. 15a–16a. Restricting derivative sovereign immunity to property damage claims against public works contractors would frustrate the critical federal interests served by extending immunity to the full spectrum of contractors that help the federal government carry out its work.

This Court articulated several of those interests in *Filarsky v. Delia*, 132 S. Ct. at 1665-66, in the context of an independent contractor's qualified immunity claim at the local government level; the significance of those immunity-related interests is amplified by orders of magnitude where the operation of the federal government is involved. *See In re KBR, Inc.*, 744 F.3d at 344 ("interpret[ing] *Filarksy* as reaffirming the principles undergirding

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state law.") (internal quotation marks omitted); *Boyle*, 487 U.S. at 511 (the discretionary function exception "demonstrates the potential for, and suggests the outlines of, 'significant conflict' between federal interests and state law in the context of Government procurement"). While derivative sovereign immunity and the *Boyle* government contractor defense often are complementary in connection with preclusion of state-tort claims, *Boyle* did not address the subject of extending federal government immunity-from-suit to government contractors for either state-law or federal damages claims. *See Boyle*, 487 U.S. at 505 n.1.; *see also In re KBR, Inc.*, 744 F.3d at 342 n.6 (discussing same).

the *Yearsley* rule"). As the Fourth Circuit explained in *In re KBR, Inc.* (multidistrict litigation composed of numerous putative class actions against a military logistical support contractor),

> *Yearsley* furthers the same policy goals that the Supreme Court emphasized in *Filarsky*. By rendering government contractors immune from suit when they act within the scope of their validly conferred authority, the *Yearsley* rule combats the "unwarranted timidity" that can arise if employees fear that their actions will result in lawsuits. *Filarsky*, 132 S. Ct. at 1665. Similarly, affording immunity to government contractors "ensur[es] that talented candidates are not deterred from public service" by minimizing the likelihood that their government work will expose their employer to litigation. *Id.* Finally, by extending sovereign immunity to government contractors, the *Yearsley* rule "prevent[s] the harmful distractions from carrying out the work of government that can often accompany damages suits." *Id.*

In re KBR, Inc., 744 F.3d at 344; *see also Al Shimari*, 679 F.3d at 263 (Niemeyer, J., dissenting) ("The Supreme Court has made clear that immunity attaches to the *function* being performed, and private actors who are hired by the government to perform public functions are entitled to the same immunities to which public officials performing those duties would be entitled.").

Insofar as the *Yearsley* defense "[i]n its original form covered only construction projects [i]ts application to military contractors advances the separation of powers and safeguards the process of military procurement." *Tozer v. LTV Corp.*, 792 F.2d 403, 405 (4th Cir. 1986). Regardless of whether a contractor provides assistance to the U.S. military, as is the case here, or provides multifarious professional or technology services to other federal departments and agencies, this Court should not allow contractors to "be left holding the bag"—facing litigation and potential liability arising out of contractual services where sovereign immunity bars similar litigation against the United States. *Filarksy*, 132 S. Ct. at 1666.

C. Derivative Sovereign Immunity Should Apply Wherever Sovereign Immunity Would Apply

The Ninth Circuit's view of derivative sovereign immunity is short-sighted. There is no principled reason why a contractor's derivative sovereign immunity should be limited to public works projects or property damage claims. Instead, derivative sovereign immunity should bar any state or federal claim against a federal government contractor where (i) a similar claim, if filed against the United States, would be barred by sovereign immunity, and (ii) the contractor was acting within the scope of its contractual relationship with the federal government when the claim arose.

This two-prong test adapts and builds upon the preemption test that the United States proposed to

this Court late last year in connection with state-tort claims against war-zone contractors arising out of U.S. military combatant activities. *See* U.S. Br., *KBR, Inc. v. Metzgar*, *supra* at 15. The Solicitor General indicated that the government's proposed preemption test is needed to "sufficiently safeguard the significant national interests at stake." *Id.* at 7. Important national interests also warrant a derivative sovereign immunity doctrine encompassing the broad range of contractual services, including but not limited to combat-zone services, that federal government contractors provide. In fact, the Solicitor General's *amicus* brief in *Metzgar* explained that "the principle of derivative sovereign immunity informs the preemption analysis," which enables "contractor personnel in performing critical functions" to avoid "fear of tort liability." *Id.* at 16, 18, 19.

Amici agree with the Solicitor General that derivative sovereign immunity would apply even if "a contractor allegedly violated the terms of the contract, as long as the alleged conduct at issue was within the general scope of the contractual relationship between the contractor and the federal government." *Id.* at 16. This is because "the appropriate recourse for the contractor's failure to adhere to contract terms and related directives would be the responsibility of the United States, through contractual, criminal, or other remedies." *Ibid.* This does not mean, however, that contractors would have blanket immunity from damages suits simply by acting within the scope of their contracts. Instead, as indicated above, for derivative sovereign immunity to apply, a similar claim filed against the

United States would have to be barred by sovereign immunity. *See, e.g.*, 28 U.S.C. § 2680(a) (FTCA discretionary function exception); *id.* § 2680(j) (FTCA combatant activities exception). In other words, the derivative sovereign immunity afforded to contractors would be coincident with, and neither broader nor narrower than, the federal government's own sovereign immunity.

Holding (or clarifying) that derivative sovereign immunity can apply to the full range of contractual functions that would be protected by sovereign immunity if performed by federal government personnel—including but not limited to public works projects and combat-zone logistical support—would serve the interests of the United States in the same way as sovereign immunity itself. Lower courts have recognized this principle, and applied it (or declined to apply it) on a case-specific basis, primarily, but not only, in personal injury cases involving contractual work for the U.S. military. *See, e.g.*, *In re KBR, Inc.*, 744 F.3d at 341 (war-zone logistical support); *In re World Trade Center Disaster Site Litig.*, 521 F.3d at 196 (domestic disaster relief); *McMahon*, 502 F.3d at 1343 (war-zone logistical support); *Mangold*, 77 F.3d at 1447-48 (engineering and analysis services for the military); *Brown v. Fort Benning Family Communities, LLC*, No. 4:14-CV-279 (CDL), 2015 WL 3505944 (M.D. Ga. June 3, 2015) (housing for military families); *Green v. ICI Am., Inc.*, 362 F. Supp. 1263 (E.D. Tenn. 1973) (operation of U.S. Army-owned TNT plant); *see also Butters*, 225 F.3d at 466 (derivative sovereign immunity under the Foreign Sovereign Immunity Act).

This Court should reaffirm that the derivative sovereign immunity doctrine sweeps broadly because of the important federal government interests that it serves.

CONCLUSION

The Ninth Circuit's judgment should be reversed. The Court should hold that Respondent's putative class-action suit is moot and must be dismissed. In addition, or alternatively, the Court should hold that the suit is barred by derivative sovereign immunity.

Respectfully submitted,

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Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* KBR, INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Amicus KBR, Inc. is one of the world's preeminent engineering, procurement, construction, and services companies, employing approximately 27,000 people in more than 70 countries. KBR has a long history of delivering effective solutions to defense and government agencies worldwide. Many of the services KBR provides are indistinguishable from services traditionally performed by the government itself. For example, KBR provides government and military organizations with base operations, facilities management, border security, logistics support, humanitarian assistance, disaster response, and engineering, procurement, and construction services. KBR has completed projects and performed services for the U.S. Army and the U.S. Departments of Energy, State, and Homeland Security, among many other government entities.

KBR often provides those services under challenging circumstances in remote locations throughout the Middle East, Asia, and Africa. For example, in connection with a contract issued by the U.S. Army through the Logistics Civil Augmentation Program, KBR has provided numerous mission-critical services to support the Army's war efforts in Iraq and Afghanistan. In that role, KBR personnel

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

served in-theater alongside uniformed military personnel, and provided combat support services including, *inter alia*, transportation, waste management, food and water supply, building and equipment maintenance, and numerous other delegated functions. General John Vines, the former Commander of the Multi-National Corps–Iraq, has described KBR's services as "essential to the success of the military's combat mission." Appendix at 430, *Harris v. Kellogg Brown & Root Servs., Inc.*, No. 12-3204 (3d Cir. Oct. 12, 2012).

Because KBR routinely operates in difficult or challenging circumstances where injuries are all but inevitable, it has also faced litigation arising out of the services it provides to the government. For example, even though KBR was performing combat support services at the direction of the military in multiple active war zones—and even though the Army consistently gave KBR high ratings for its performance—KBR has been sued by numerous plaintiffs who seek to hold the company liable for alleged injuries incurred on foreign battlefields.

KBR has previously invoked the derivative sovereign immunity doctrine in response to many of these claims. Indeed, derivative sovereign immunity is one of KBR's core defenses in a massive, multi-district litigation challenging the company's operation of "burn pits" in Iraq and Afghanistan. *See In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 337-38 (4th Cir. 2014). KBR thus has a direct and substantial interest in ensuring that the Ninth Circuit's narrow and profoundly flawed interpretation of the derivative sovereign immunity doctrine is reversed.

KBR fully agrees with the arguments about derivative sovereign immunity advanced by Petitioner. *See* Pet. Br. 35-50. The company submits this *amicus* brief to provide additional background about the situations in which contractors perform delegated government functions, to discuss additional practical considerations that support a robust immunity doctrine, and to provide additional context about the proper legal standard for derivative sovereign immunity.

SUMMARY OF ARGUMENT

Since the Founding, federal, state, and local government entities have routinely turned to private individuals and companies to assist with the performance of public functions. Private contractors are able to offer specialized skills, knowledge, and expertise that may not be possessed by the permanent government workforce. Contractors also promote both flexibility and efficiency because they can be engaged on a project-by-project basis, thereby eliminating the need to hire and train additional full-time government employees.

Indeed, especially in the military context, the government now routinely delegates to private companies tasks that the armed forces once performed themselves. During the wars in Iraq and Afghanistan, the government relied extensively on private companies such as *amicus* KBR to provide numerous mission-critical combat support services that were performed by uniformed personnel during previous wars.

The derivative sovereign immunity doctrine provides a critical protection for individuals and

companies that perform delegated government functions. Sovereign immunity typically protects the government from suits for money damages when the government acts through full-time government employees. The derivative sovereign immunity doctrine bookends the government's own sovereign immunity by recognizing that the same protection should apply regardless of whether the government delegates a function to a private company or instead performs it in-house. Either way, the activity is still an *"act of the government," Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18, 21-22 (1940) (emphasis added), and should be entitled to the full range of immunity protections for such sovereign acts. In other words, immunity protections should turn on the *function* being performed rather than the *identity* of the person performing it.

For example, during the wars in Iraq and Afghanistan, Army personnel operated "burn pits" for waste disposal at many forward operating bases, but the Army delegated this task to KBR at certain other bases. It would be entirely illogical to have a rule in which the Army is immune from suit for its own burn pit operations, but KBR could face private claims for money damages for performing the *exact same functions* at a neighboring base pursuant to delegated contractual authority.

This Court has explained at length why it is critical to provide broad immunity for private companies and individuals who perform delegated government functions. Claims for money damages against a contractor can impair the paramount "interest in getting the government's work done" every

bit as much as claims directly against the government. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 505 (1988). If contractors are subject to liability for performing tasks within the scope of their delegated authority, then they may be forced to raise the price they charge for those services, or may refuse to offer such services to the government in the future. As a result, the government would be deprived of the skills and expertise that private companies and individuals are able to offer. And even if contractors were not deterred from working for the government, the threat of liability may lead to "unwarranted timidity in the performance of public duties." *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012). Broad immunity for those performing delegated government functions helps ensure that "those who serve the government do so 'with the decisiveness and the judgment required by the public good.'" *Id.*

Derivative sovereign immunity also has several advantages over other doctrinal alternatives for protecting those important interests. Rather than requiring courts to fashion federal common law defenses on an *ad hoc* basis, derivative sovereign immunity takes advantage of Congress' decisions about the circumstances in which sovereign immunity is waived. Recognition of derivative sovereign immunity does not automatically mean that a suit will be barred. But once derivative sovereign immunity is implicated, the burden properly shifts to the plaintiff to identify a waiver of sovereign immunity. The derivative sovereign immunity doctrine is thus straightforward to apply, and offers protection that is no broader than the government's own sovereign immunity for services it self-provides.

Several other practical considerations also counsel in favor of a robust immunity doctrine. In particular, the government itself already has a wide array of tools to ensure that its contractors are properly discharging their public functions in accordance with the contracts and all other applicable laws. Any private claims brought by third parties are thus superfluous at best, and would risk interfering with the government's ability to manage and oversee its contractors. Indeed, in this very case—and in many of the cases in which KBR is currently a defendant—the government *approved and accepted* the contractor's performance. Under those circumstances, it is absurd to allow third-party plaintiffs to challenge the contractor's actions (but not the government's) through private claims for money damages.

* * *

This Court need not break new ground to resolve this case, as *Yearsley* already articulates the proper standard for when derivative sovereign immunity should apply: if a contractor is acting pursuant to delegated authority "validly conferred" by the government, then "there is no liability" unless the contractor "exceeded his authority"—*i.e.*, acted outside the scope of the contract. 309 U.S. at 21-22. That is a workable and well-established standard that is closely related to the "scope of employment" test that applies in many other areas of the law. Under that standard, an action taken in good faith to discharge the contractor's delegated functions can be within the scope of the contract even if the plaintiff alleges that it was negligent or improper. *See, e.g., Aversa v.*

United States, 99 F.3d 1200, 1209-13 (1st Cir. 1996). In contrast, derivative sovereign immunity would not protect a contractor from liability for actions beyond the scope of the contract—*i.e.*, actions that are "different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." Restatement (Second) of Agency §228(2) (1958).

The Ninth Circuit's approach to derivative sovereign immunity in the decision below rests on an untenable interpretation of this Court's precedents and has little to recommend it. Rather than applying the clear rule this Court established in *Yearsley* and subsequent cases, the Ninth Circuit held—largely based on policy concerns about compensating plaintiffs—that *Yearsley* is inapplicable beyond the specific factual context in which it arose. That holding oversteps the boundaries of the proper role of a lower court. Lower courts must faithfully apply the *rules* and *principles* established by this Court, and not dismiss governing Supreme Court precedents as limited to the unique facts of those cases. This Court should reverse the judgment of the Ninth Circuit and reaffirm that private companies or individuals should not be left "holding the bag" for money damages when they perform delegated government functions for which the government itself would be immune from suit.

ARGUMENT

I. Contractors Such As KBR Provide A Wide Range Of Indispensable Support Services That The Government Would Otherwise Have To Perform Itself.

Federal, state, and local government entities have long relied on private individuals and companies to assist with the performance of public functions. Contractors such as *amici* routinely perform core government functions pursuant to delegated authority, including a broad array of distinctly sovereign tasks that the government once performed—and often continues to perform—itself.

That trend has been particularly pronounced in the military context. Before the advent of the modern, all-volunteer military, uniformed soldiers typically performed combat support functions such as maintaining facilities, transporting supplies, preparing meals, and performing countless other logistical and support tasks that are essential to the war effort. But with the transition to the modern, all-volunteer military—and the corresponding reduction in the size of the armed forces—it is now often impractical or infeasible for such tasks to be performed by uniformed soldiers.

Instead, the military has increasingly relied on in-theater service contractors to perform essential combat support functions. Thus, whereas meals in World War II may have been prepared by uniformed soldiers on "KP duty," today that function is routinely performed by a combat support contractor such as KBR. Using contractors in this manner allows for a more efficient allocation of scarce resources and frees

up uniformed personnel to focus on their core warfighting functions. According to the Department of Defense, "the U.S. would currently be unable to arm and field an effective fighting force" without "contractor support." Moshe Schwartz & Wendy Ginsberg, Cong. Research Serv., R41820, *Department of Defense Trends in Overseas Contract Obligations* i (2013).

Amicus KBR has been at the forefront of these developments, and has provided mission-critical "combat service support" to the Army in recent conflicts in the Balkans, Iraq, and Afghanistan (among others). *See supra* at 2 (Commander of the Multi-National Corps–Iraq describing KBR's services as "essential to the success of the military's combat mission"). The Army defines "combat service support" as the provision of "essential capabilities, functions, activities, and tasks necessary to sustain all elements of operating forces in theater at all levels of war."[2]

Pursuant to an umbrella contract with the Army, KBR has provided numerous combat support services for the war effort, including building maintenance, waste management, equipment repair, water treatment, food preparation, and laundry service. *See, e.g.*, *Aiello v. Kellogg Brown & Root Servs.*, 751 F. Supp. 2d 698, 700-02 (S.D.N.Y. 2011); *Taylor v. Kellogg Brown & Root Servs.*, 658 F.3d 402, 403-04, 406 (4th Cir. 2011); *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 337-38 (4th Cir. 2014); *Harris v. Kellogg Brown & Root Servs.*, 724 F.3d 458 (3d Cir. 2013).

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[2] U.S. Army Field Manual 1-02, Operational Terms and Graphics at 1-36 (2004).

For example, the Army routinely engaged KBR to operate "burn pits" for waste disposal at forward operating bases in Iraq and Afghanistan. Needless to say, there is no routine garbage service at a remote outpost in an active war zone. And, at many bases, it was too expensive or impractical to build trash incinerators. Senior Army officials—up to and including General David Petraeus—thus concluded that open-air "burn pits" were often the safest, most sanitary, and most efficient means of waste disposal. *See In re KBR Burn Pit Litig.*, 925 F. Supp. 2d 752 (D. Md. 2013). At some bases, Army personnel would operate the burn pit, while at other bases the Army would delegate that task to KBR (subject at all times to the Army's plenary supervision and control).

KBR and other contractors have also been responsible for transporting fuel, supplies, and personnel, providing base security, and providing interpretation and interrogation services. *See, e.g.*, *Carmichael v. Kellogg Brown & Root Servs.*, 572 F.3d 1271, 1275-78 (11th Cir. 2009); *McMahon v. Presidential Airways*, 502 F.3d 1331, 1336-37 (11th Cir. 2007); *Saleh v. Titan Corp.*, 580 F.3d 1, 2 (D.C. Cir. 2009). And KBR personnel played an integral role in restoring Iraq's oil infrastructure to promote that country's economic independence, which was a critical goal of both military and foreign policy officials. *See McManaway v. KBR, Inc.*, 554 Fed. Appx. 347, 348 (5th Cir. 2014) (Jones, J., dissenting from denial of rehearing *en banc*).

In short, KBR personnel served in-theater alongside and at the direction of uniformed military personnel, performing tasks that have historically

been done by the military. And, unfortunately, like uniformed military personnel, KBR personnel were frequently the targets of enemy attacks. A number of KBR personnel were injured or killed in the line of duty while supporting the Army's mission in Iraq and Afghanistan. It is not an overstatement to say that KBR has served on the front lines in the War on Terror, the Iraq War, and many other global conflicts.

II. The Derivative Sovereign Immunity Doctrine Is A Critical Protection For Contractors That Perform Delegated Government Functions.

A. The Government Is Typically Immune From Suit for Money Damages for Services It Self-Provides.

Virtually all of the contracted services discussed above are functions that the government previously performed itself and, indeed, often continues to perform itself. The Army may use a convoy of trucks driven by soldiers to supply food, water, and fuel to a remote outpost in Iraq, or it may engage a contractor such as KBR to do the same. At some forward operating bases, Army personnel would operate the burn pit for waste disposal, while at other bases the Army delegated that function to KBR. And, even outside of combat situations, the Army may handle critical support tasks (such as recruiting) in-house, or it may delegate those functions to a contractor such as Petitioner Campbell-Ewald.

When the government performs these services itself, there is no question that it would be protected by sovereign immunity from private claims for money damages. The Federal Tort Claims Act provides a

general waiver of the United States' sovereign immunity, subject to a number of broad exceptions, including: claims based on "the exercise or performance or the failure to exercise or perform a discretionary function"; claims "arising out of the combatant activities of the military ... during time of war"; and "[a]ny claim arising in a foreign country." 28 U.S.C. §2680(a), (j), (k). And this Court has long held that the government is immune from private claims under federal law unless Congress has *clearly* indicated that such suits should be allowed. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Filarsky*, 132 S. Ct. at 1665.

A claim by a private plaintiff challenging the Army's operation of a fuel convoy or burn pit in Iraq would likely fall within several different FTCA exceptions, and would thus be barred by sovereign immunity. Unsurprisingly, few plaintiffs have even attempted to sue the government directly for money damages for alleged injuries arising out of the war effort.

B. This Court Has Repeatedly Recognized the Importance of Broad Immunity for Those Who Perform Delegated Government Functions.

The derivative sovereign immunity doctrine is a critical bookend to the government's own sovereign immunity, as it prevents plaintiffs from doing indirectly what they cannot do directly. If the activity in question involves a *government function*, it should not matter in the slightest whether the government performs that activity itself or instead engages a private company or individual to handle it on the

government's behalf. Either way, the activity is still an act of the government, and should be entitled to the full range of immunity protections for such sovereign acts.

This Court has repeatedly acknowledged this basic principle. Although the Court's decisions have arisen in a variety of factual and legal contexts, the Court has made crystal clear that private contractors should not be left "holding the bag" for money damages when they perform delegated government functions for which the government would be immune if sued directly.

1. In *Yearsley*, a private company, acting pursuant to a contract with the Army Corps of Engineers, built dikes that caused erosion of the plaintiffs' land. 309 U.S. at 19. The plaintiffs sought to recover money damages from the contractor for that injury, but this Court unanimously rejected the plaintiffs' claims. As the Court explained, "if [the] authority to carry out the project was validly conferred, that is if what was done was within the constitutional power of Congress, *there is no liability on the part of the contractor for executing its will*." *Id.* at 20-21 (emphasis added).

The Court identified only two narrow circumstances in which it would be appropriate to hold a contractor liable for actions taken pursuant to a government contract: if the contractor "exceeded his authority," or if that authority "was not validly conferred" in the first place. *Id.* at 21. In contrast, when a company *is* acting within the scope of its authority pursuant to a valid contract with the United States, its actions effectively amount to "act[s] of the

government," and any tort claims challenging those actions are barred by derivative sovereign immunity. *Id.* at 21-22.

This Court further emphasized the importance of robust protection for government contractors in *Boyle v. United Technologies*, 487 U.S. 500 (1988). Although *Boyle* involved preemption of state-law claims against contractors, rather than derivative sovereign immunity, much of this Court's reasoning fully supports a broad doctrine of derivative sovereign immunity. Indeed, the Court cited and relied upon *Yearsley*'s reasoning in crafting the preemption framework that it adopted in *Boyle*. *See id.* at 505-06 (discussing *Yearsley* and noting that the federal interest in providing immunity to contractors who perform government functions "surely exists as much in procurement contracts as in performance contracts"). And the United States recognized just last Term that "the principle of derivative sovereign immunity informs the preemption analysis." Br. for United States as Amicus Curiae at 18-19, *KBR, Inc. v. Metzgar*, No. 13-1241, 2014 WL 7185601 (U.S. Dec. 16, 2014) ("U.S. *Metzgar* Br."). Whether the doctrine is framed in terms of preemption or derivative sovereign immunity, there is no question that it would be "detrimental to military effectiveness" if "contractors that the U.S. military employs during hostilities are subject to the laws of fifty different states for actions taken within the scope of their contractual relationship supporting the military's combat operations." *Id.* at 21.

In *Boyle*, this Court emphasized that claims against private contractors can impair the paramount

"interest in getting the Government's work done," every bit as much as claims directly against the government. 487 U.S. at 505. Plaintiffs suing contractors often claim that they are merely seeking a remedy for a *private* wrong, but this Court emphatically disagreed. As the Court explained, "[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts," because "either the contractor will decline to manufacture the design specified by the Government, or it will raise its price." *Id.* at 507. Either way "the interests of the United States will be directly affected." *Id.*

The Court also discussed at length the problems that would result if plaintiffs could bring suits against contractors that would be barred by sovereign immunity if brought directly against the government. In many cases, "[t]he financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability." *Id.* at 511-12. In short, "[i]t makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." *Id.* at 512.

2. The Court addressed these issues again most recently in *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012). That case specifically addressed the scope of the qualified immunity defense to a claim under 42 U.S.C. §1983, but the Court's analysis drew upon the

same principles that underlie the derivative sovereign immunity doctrine. *See* 132 S. Ct. at 1660. Indeed, *Filarsky* is particularly illuminating because it makes clear that immunity defenses must turn on the *function* being performed rather than the *identity* of the person performing that function.

The plaintiff in *Filarsky*—a firefighter who was being investigated for abusing his sick leave—brought claims against a number of individuals involved in the investigation, including a private lawyer who had been hired by the city to assist with the investigation. *Id.* at 1660-61. The Ninth Circuit had held that this lawyer could not claim the protection of qualified immunity because he was "a private attorney and not a City employee," *id.* at 1661, but this Court unanimously rejected that narrow interpretation of the immunity doctrine.

As the Court explained, "[a]t common law, those who carried out the work of government enjoyed various protections from liability when doing so, in order to allow them to serve the government without undue fear of personal exposure." *Id.* at 1660. When the immunity doctrines were developed in the nineteenth century, governments "operated primarily at the local level," and [l]ocal governments ... generally had neither the need nor the ability to maintain an established bureaucracy staffed by professionals." *Id.* at 1662. Instead, governments were to a significant extent "administered by members of society who temporarily or occasionally discharge[d] public functions." *Id.* Private citizens were "actively involved in government work, especially where the work most directly touched the lives of the people." *Id.*

at 1663. Among many other roles, private citizens routinely served as postmen, wharfmasters, prosecutors, judges, sheriffs, and constables. *Id.* at 1663-64.

In light of the broad array of public functions that private citizens often performed, "it should come as no surprise that the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities." *Id.* at 1663. The protections provided by the common law simply "did not turn on whether someone ... worked for the government full-time or instead for both public and private employers." *Id.* at 1664. And "examples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself." *Id.* at 1665.

The Court also explained at length why it was critical to have broad immunity for those *performing government functions*, regardless of whether those functions were performed by government employees or private citizens. Quite simply, immunity from suit "protect[s] government's ability to perform its traditional functions." *Id.* at 1665. It does so by "helping to avoid 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits." *Id.* Ensuring that "those who serve the government do so 'with the decisiveness and the judgment required by the public good' ... is of vital

importance regardless whether the individual sued as a state actor works full-time or on some other basis." *Id.*

The Court further noted that unwarranted disparities would exist if full-time government employees were protected by immunity but those acting pursuant to delegated authority were not. Private individuals routinely "work in close coordination with public employees, and face threatened legal action for the same conduct." *Id.* at 1666. Because government employees "will often be protected from suit by some form of immunity," contract employees working alongside them "could be left holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *Id.* And that liability risk would, in turn, hinder the government's ability to "secure the services of private individuals" who may possess "specialized knowledge or expertise." *Id.* at 1665-66.

* * *

At bottom, *Yearsley*, *Boyle*, and *Filarsky* all recognize the basic reality that it is essential for the government to be able to work through private companies or individuals who can offer unique expertise or capabilities. But the fact that the government is operating through a private contractor does not change the fact that a *government function* is still being performed. "[T]he same policy considerations that justify immunity for government employees can apply with equal force to private actors when they are charged with implementing government policies." *Murray v. Northrop Grumman*

Info. Tech., Inc., 444 F.3d 169, 174-75 (2d Cir. 2006). Thus, if the government's sovereign immunity "protects a particular governmental function," it is a "small step to protect that function when delegated to private contractors." *Mangold v. Analytic Servs.*, 77 F.3d 1442, 1447-48 (4th Cir. 1996).

Indeed, although derivative sovereign immunity serves the same underlying interests as the preemption doctrine applied in *Boyle*, it has significant advantages over the doctrinal alternatives. Rather than force courts to fashion the doctrine on an *ad hoc* basis, derivative sovereign immunity allows courts to rely on the decisions Congress has made in waiving sovereign immunity and fashioning exceptions to the waiver. Recognizing a robust derivative sovereign immunity doctrine does not automatically mean that a suit against a contractor will be barred. But it does place the burden on the plaintiff to identify a waiver of sovereign immunity, which in turn requires consideration of Congress' judgments in waiving sovereign immunity for certain torts subject to certain exceptions. That result not only makes policy sense, but focuses the analysis where it properly belongs—namely, on the types of sovereign functions for which the government would be immune from suit if it performed those tasks itself.

C. Claims Against Contractors Performing Delegated Functions Are Superfluous in Light of the Government's Plenary Authority to Oversee Its Contractors.

In addition to the compelling reasons for a robust immunity doctrine set forth in *Yearsley*, *Boyle*, and *Filarsky*, several other practical considerations also

counsel in favor of broad immunity for individuals and companies that perform delegated government functions. In particular, it is critical to keep in mind that *the government itself* has plenary authority to oversee and regulate its contractors' actions, and to take steps to remedy any alleged deficiencies in a contractor's performance. Thus, any private suits for money damages against a contractor would not only be superfluous, but would also interfere with the government's ability to manage its contractors and delegate functions as it deems appropriate.

The government has numerous tools at its disposal to ensure that contractors are properly performing their delegated functions in compliance with the terms of the contract and all relevant laws. Most obviously, if a contractor does not meet the contract's specifications or acts in violation of the law, the government can assert a breach of the contract or can seek to terminate it. For example, the U.S. Agency for International Development recently suspended two contractors for unsatisfactory work on housing projects in Haiti.[3] And, more prominently, following the disastrous launch of Healthcare.gov, the government ended its contract with the primary outside vendor for that site.[4] The government has both the tools and the incentives to ensure that its

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[3] *Second USAID Contractor Suspended Following Caracol Housing Debacle*, Ctr. for Econ. and Policy Research Blog, (Mar. 30, 2015), http://perma.cc/3nae-jvph.

[4] *See* Juliet Eilperin & Amy Goldstein, *Obama administration to end contract with CGI Federal, company behind HealthCare.gov*, Washington Post, Jan. 10, 2014.

contractors are following the terms of the contract and all other applicable laws.

Moreover, a contractor that performs poorly or fails to comply with the law may be shut out of future government contracts. Government agencies have inherent authority to use "suspension and debarment" procedures to prevent contractors from bidding on government work for a specified period of time if they have engaged in various forms of misconduct. *See, e.g.*, *Gonzalez v. Freeman*, 334 F.2d 570, 576-77 (D.C. Cir. 1964). Suspension or debarment can be ordered for serious misconduct such as fraud or a criminal conviction, but can also be imposed for any other "compelling" reason that casts doubt on the contractor's "present responsibility."[5] For example, contractors have been suspended or debarred for: violating the Clean Air Act or Clean Water Act; failing to comply with drug-testing or affirmative action requirements for employees; and failing to comply with certain immigration and labor requirements. *Id.* The federal government has sharply increased its use of suspensions and debarments in recent years.[6]

Given all of these built-in checks on contractors' conduct and performance, private remedies are

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[5] *See generally* Kate M. Manuel, Cong. Research Serv., RL34753, *Debarment and Suspension of Government Contractors: An Overview of the Law, Including Recently Enacted and Proposed Amendments*, (2012), http://1.usa.gov/1L34YDU.

[6] In FY2014, federal agencies and departments reported 5,179 suspensions, proposed debarments, and debarments, an 8% increase over FY2013 and a three-fold increase since FY2009. Neil Gordon, *Suspension and Debarment by the Numbers*, Project on Gov't Oversight (Apr. 24, 2015), http://perma.cc/ef4h-bfu2.

unnecessary at best, and would often prove counterproductive. Indeed, it would be especially absurd to allow private, third-party plaintiffs to sue a contractor for money damages based on its performance of otherwise-immune government functions where the government itself has approved and accepted the contractor's performance. For example, the Army consistently rated KBR's work in Iraq and Afghanistan as "Good," "Very Good," or "Excellent," and even awarded the company significant "award fees" for its performance.[7] Yet a number of private plaintiffs have nonetheless sought to challenge KBR's performance of those very same contractual duties. Here, too, Respondent seeks money damages from Campbell-Ewald even though the Navy reviewed and approved the text messages in question. *See* Pet. Br. 4-6.

Under these circumstances, a suit against KBR or Campbell-Ewald is no different in practice from a suit *directly against the government* that seeks to second-guess its delegation of authority. The derivative sovereign immunity doctrine helps ensure that the government—rather than private plaintiffs—has the ultimately responsibility to oversee its contractors, and that those contractors are not held liable for what the government considers a job well done.

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[7] *See, e.g.*, Press Release, KBR Receives LogCAP III Award Fee (May 12, 2010), http://perma.cc/N6DE-KDU9.

III. Derivative Sovereign Immunity Should Protect Contractors From Liability For Claims Arising Out Of Delegated Government Functions Within The Scope Of Their Contractual Authority.

A. The Ninth Circuit's Narrow Interpretation of the Derivative Sovereign Immunity Doctrine Is Wholly Without Merit.

The Ninth Circuit's narrow and wooden interpretation of the derivative sovereign immunity doctrine in the decision below does not withstand scrutiny. *See* Pet. Br. 35-50.

Because *Yearsley* involved claims for property damage arising out of a public works project, the Ninth Circuit held that the derivative sovereign immunity doctrine is similarly limited to "claims arising out of property damage caused by public works projects." Pet.App.15a. Applying that logic, the Ninth Circuit would presumably hold that *Marbury v. Madison*, 5 U.S. 137 (1803), is limited to cases involving the delivery of commissions, and *Gibbons v. Ogden*, 22 U.S. 1 (1824), is limited to cases involving steamboat monopolies. This is obviously not the proper way for a lower court to apply Supreme Court precedent. It is the duty of a lower court to apply the *rules* and *principles* established by this Court in the relevant precedents, not to mechanically limit this Court's decisions to the factual contexts in which they arose.

In all events, the Ninth Circuit's attempt to limit *Yearsley* to its facts fails. The Ninth Circuit did not even attempt to explain why derivative sovereign

immunity should apply in cases involving "property damage caused by public works projects," but should not apply in cases involving personal injuries (such as alleged injuries from a burn pit in Iraq) or other alleged harms (such as receiving an unwanted text message). *Yearsley* very explicitly states that there are only two circumstances in which a contractor performing a delegated government function should be held liable to a third party for money damages: where the contractor "exceeded his authority," or where that authority "was not validly conferred" by the government. 309 U.S. at 21. This Court did not remotely suggest that this was a special protection that applied only to public-works contractors sued for damaging someone's property.

The Ninth Circuit also asserted that this Court's holding in *Yearsley* turned the availability of an "alternate remedy" for the plaintiffs (via a takings claim against the government). Pet.App.15a-16a. But, once again, nothing in this Court's decision establishes that limitation. To the contrary, the Court made crystal clear that "if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, *there is no liability on the part of the contractor for executing its will.*" *Yearsley*, 309 U.S. at 20-21 (emphasis added). The fact that the plaintiff in *Yearsley* was able to pursue a takings claim against the government might have made that a particularly easy case, but it was by no means essential to this Court's holding. Sovereign immunity, whether derivative or direct, usually leaves a plaintiff without a remedy. Congress is well aware of that, which is

why it has waived sovereign immunity in some circumstances but not others.

Other courts have correctly recognized that the availability of an alternative remedy for money damages is not a *sine qua non* for application of derivative sovereign immunity under *Yearsley* (or any other sovereign immunity doctrine, for that matter). For example, in *Ackerson v. Bean Dredging*, 589 F.3d 196, 202-03 (5th Cir. 2009), the plaintiffs brought claims for "negligence, breach of implied warranty, concealment, and violation of environmental-protection laws," alleging that a group of dredging contractors took actions that amplified the environmental damage caused by Hurricane Katrina. There was no suggestion whatsoever that the plaintiffs could have brought those state-law claims against the government in a different forum, yet that posed no bar to the Fifth Circuit's application of derivative sovereign immunity. *See id.* at 204 ("We agree with the district court's ruling that ... the Contractor Defendants are entitled to government-contractor immunity under *Yearsley*.").

The Ninth Circuit also expressed policy-based concerns that application of the derivative sovereign immunity doctrine would prevent contractors from being "held accountable for their wrongful conduct." Pet.App.20a. But, as noted above, the government always retains authority to monitor and supervise its contractors and hold them "accountable" for any shortcomings in their performance. *See supra* at 19-22. Here, for example, if the Navy believed that Campbell-Ewald was violating the terms of its contract or the TCPA, it could have instructed the

company to cease any improper practice. And, if the company persisted despite that warning, the government could have sought to terminate the contract or could have selected a different company to handle its recruiting services when the contract was up for renewal. It makes no sense at all to allow private plaintiffs to challenge Campbell-Ewald's actions under the contract given that the Navy closely monitored the company's conduct and approved its performance.

Finally, the Ninth Circuit suggested that the derivative sovereign immunity doctrine should be applied narrowly and "with the utmost care" because it will result in plaintiffs being "denied compensation." Pet.App.20a. But that clear statement rule gets matters exactly backwards. After all, "den[ying] compensation" is just the obverse of "protecting the fisc," which is the *raison d'etre* of any immunity doctrine. Indeed, with respect to sovereign immunity, this Court applies a strong presumption that there has *not* been a waiver or abrogation of the government's immunity absent a clear indication to the contrary. *See, e.g.*, *Price v. United States*, 174 U.S. 373, 375-76 (1899) (it is an "axiom of our jurisprudence" that "[t]he government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it"); *Sossamon v. Texas*, 131 S. Ct. 1651, 1657-58 (2011) (no waiver of state sovereign immunity absent a "clear" or "unequivocal" waiver). The Court has long applied this clear-statement rule even though the result will be to "deny compensation" to many plaintiffs who seek to sue the government for money damages.

In all events, the Ninth Circuit's concerns about an overly broad derivative sovereign immunity doctrine are misplaced. Only where Congress has determined that there should not be a waiver of the government's own sovereign immunity will derivative sovereign immunity apply. And, even then, there may still be alternative remedies available to plaintiffs who are actually injured. For example, as the United States has explained, even if derivative sovereign immunity would bar private suits for money damages against battlefield support contractors such as KBR, "other legal avenues for obtaining compensation are available" for service members or other personnel injured in the line of duty. U.S. *Metzgar* Br. at 17-18.[8] Thus, even though derivative sovereign immunity does not turn on the availability of an alternative form of compensation, the absence of a private claim for money damages against a contractor hardly suggests that legitimately injured individuals will be left with no remedy whatsoever.

B. The Proper Test Should Provide That Contractors Are Immune From Suit for Actions Taken Within the Scope of a Validly-Issued Contract.

The Court need not break new ground to resolve this case because the proper test for derivative sovereign immunity is already set forth in *Yearsley*:

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[8] In particular, the Department of Veterans Affairs provides compensation for soldiers "[f]or disability resulting from personal injury suffered ... in [the] line of duty." 38 U.S.C. §§1110, 1131. And the Defense Base Act, 42 U.S.C. §1651, establishes a federal workers' compensation system for employees injured or killed while working under a government contract.

when a contractor is performing delegated government functions pursuant to a validly issued contract, there can be no liability unless the contractor "exceeded his authority"—*i.e.*, acted outside the scope of the contract. 309 U.S. at 21.[9] That rule is eminently reasonable. If a contractor is performing delegated tasks within the scope of the contract, then those tasks are effectively government functions *in their own right* and should be protected by the same immunities as if they were performed by full-time government employees. *See Yearsley*, 309 U.S. at 21-22 (actions taken pursuant to a valid contract are "act[s] of the government").

Whether a certain action was taken within the scope of a contract is also a workable and well-established legal standard. Indeed, it is essentially identical to the inquiry under the Westfall Act that is used to determine when federal employees are immune from suit. That statute precludes any civil action against a federal employee for "injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government *while*

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[9] The United States has advanced a similar test for preemption of state-law tort claims against battlefield support contractors, to ensure that "contractors performing essential tasks in an active theater of war" are not "subject to the laws of fifty different states." U.S. *Metzgar* Br. at 7. The United States argued that state-law claims against a contractor should be found preempted if: (1) the claim would have been barred by sovereign immunity if brought directly against the government; and (2) the contractor was "acting within the scope of its contractual relationship with the federal government at the time of the incident out of which the claim arose." *Id.* at 15-16.

acting within the scope of his office or employment." 28 U.S.C. §2679(b)(1) (emphasis added). The scope-of-employment inquiry is also informed by common law principles of respondeat superior, which address when a principal should be held liable for the acts of an agent. *See Jamison v. Wiley*, 14 F.3d 222, 227 n.2 (4th Cir. 1994) (Westfall Act immunity evaluated "by reference to the respondeat superior law of the state in which the conduct occurred").

Critically, an action can be within the *scope* of a government contract even if the plaintiff alleges that it was negligent or improper. *See, e.g., United States v. Smith*, 499 U.S. 160 (1991) (alleged medical malpractice by Army physician occurred within the scope of employment); *Aversa v. United States*, 99 F.3d 1200, 1209-13 (1st Cir. 1996) (allegedly slanderous press release was within the scope of employment for IRS agent even though it was "contrary to his employer's policies and rules"); *Coyne v. United States*, 233 F. Supp. 2d 135, 140-42 (D. Mass. 2002) (FBI agent's accidental disclosure of identity of confidential informant was within the scope of employment).[10] Courts have generally found an action to be within the scope of employment if it was "authorized by the employer or incidental to authorized duties; if it was

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[10] Contracts that involve dangerous, uncertain, or quickly-evolving situations may include a promise by the government to indemnify the contractor for any litigation or civil liability arising out of the agreement, "whether or not caused by the negligence of the Contractor or of the Contractor's agents, servants, or employees." 48 C.F.R. §52.228-7. The fact that allegedly negligent conduct may be covered by an indemnification clause only underscores that such conduct still falls within the scope of the contract.

done within the time and space limits of the employment; and if it was actuated at least in part by a purpose to serve an objective of the employer." *Aversa*, 99 F.3d at 1210.[11]

In contrast, derivative sovereign immunity would not protect a contractor from liability if its action was beyond the scope of the contract—*i.e.*, if it was "different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." Restatement (Second) of Agency §228(2) (1958); *see also Etherage v. West*, 587 Fed. Appx. 390, 391 (9th Cir. 2014) (applying Restatement test). Derivative sovereign immunity thus would not apply if, for example, a contractor employee took a vehicle on a joyride or committed sexual assault while stationed on a military base. But when a contractor performs services in a good-faith effort to discharge its contractual duties—as Petitioner did here, *see* Pet. Br. 43-50, and as KBR unquestionably did while supporting the Army's mission in Iraq and Afghanistan—it should retain the full panoply of protections for those performing delegated government functions.

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[11] Unlike the Ninth Circuit, the Fourth Circuit has correctly recognized that *Yearsley* is not limited to property damage claims arising out of public works contracts. *See In re KBR*, 744 F.3d at 342-44. But the Fourth Circuit has nonetheless held that a contractor is not entitled to the protection of that doctrine unless it has *fully complied* with all aspects of the contract. *See id.* at 345 (derivative sovereign immunity applies only if the contractor "acted in conformity with" its contract). As the cases cited above make clear, that is an overly narrow interpretation of the "scope of the contract" standard.

CONCLUSION

For the foregoing reasons, this Court should reverse the Ninth Circuit's profoundly flawed interpretation of the derivative sovereign immunity doctrine.

Respectfully submitted,

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CAMPBELL-EWALD COMPANY,
Petitioner,

v.

JOSE GOMEZ,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF LAWYERS FOR CIVIL JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. LCJ's primary purpose is to advocate for fairness and balance in proposed changes to the Federal Rules of Civil Procedure ("FRCP") through the Rules Enabling Act process. Since its founding in 1987, LCJ has become a leading voice on FRCP reform, most recently providing insight into the debate over proportionality in Rule 26 and sanctions for failure to preserve electronically stored information in Rule 37(e), both related to the amendments this Court recently adopted. LCJ has filed written comments related to the Advisory Committee's current work to develop potential amendments to Rule 23.

Respondent has urged the Court to defer to the Rules Enabling Act process rather than to decide whether the effect of an offer of complete relief is different when the plaintiff has a asserted a claim under Rule 23 but a class has not been certified.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Both parties here filed blanket consents to amicus briefs, which are reflected in the docket of this case.

LCJ has specific expertise in the FRCP and the rulemaking process, drawing on both its own policymaking efforts and the collective experience of its members in litigating the FRCP as written. Accordingly, LCJ writes as *amicus curiae* to offer this Court a unique perspective on whether the question of allowing an offer of relief to the named plaintiff to moot a class action complaint is more appropriately addressed by the Court in its role as an Article III court, or in its legislative role as delegated to the Judicial Conference's Committee on Rules of Practice and Procedure (the "Standing Committee) and its Advisory Committee on Civil Rules. LCJ's experience with the rulemaking process during previous attempts to reform Rules 23 and 68 gives it an essential perspective on the current debate over the interaction of these two Rules.

Given this extensive experience with the FRCP, LCJ has a strong interest in seeing the Court reverse the decision below, which rests on the fallacious assumption that a designation of a complaint as a class action somehow changes the operation of the other Federal Rules of Civil Procedure.

SUMMARY OF ARGUMENT

This case continues an important debate about the character of Rule 23 class actions, namely: are they an advanced joinder device, or something more transformative that should be governed by different rules than other cases in federal court? If it is merely a joinder device, then using the words "class action" in the complaint changes nothing about the litigation until a class is properly certified. If it is something

more than that, then courts are justified in treating even putative class actions as entities that require special protection before certification. Based on the dictates of Article III of the Constitution, the Rules Enabling Act, and the FRCP themselves, LCJ respectfully submits that, until a class is certified, a class action lawsuit is no different from an individual lawsuit.

As a result, the Court need not and should not defer to the Rules Enabling Act process to decide whether, in an asserted class action but prior to class certification, an unaccepted offer that fully satisfies plaintiff's claim renders the claim moot. Although the Rules Enabling Act process carries real benefits to litigation, the Court, not the Advisory Committee on Civil Rules, is charged with resolving live controversies over interpretation of the FRCP as written. The Rules Enabling Act does not grant authority to change or define constitutional or substantive rights such as the definition of mootness. Moreover, the rulemaking process is designed to move at a cautious pace, consider multiple proposals as well as extensive public comment, and achieve consensus over any rules reform. While this is an important and effective process, it is ill-suited for deciding substantive rights or individual cases.

Based on these same principles, it is also clear that the Court should not ignore Rule 68 as written in order to protect certain pre-certification class actions. The FRCP are designed to apply in *all* lawsuits, and they do not change simply because a case has been designated a "class action" in the complaint's caption. The Ninth Circuit's holding

below relies on the fact that the lawsuit at issue is a class action, but never explains why the certification process under Rule 23—which was not yet invoked—should render the logic of mootness irrelevant in this case. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875 (9th Cir. 2014). In doing so, it necessarily privileges class actions over other forms of litigation.

Finally, this Court should not look to the "conceptual sketches" released by the Rule 23 Subcommittee as persuasive authority in this case. They are deliberately provocative, and push the boundaries of what is allowed under the Constitution and the Rules Enabling Act as a means of promoting discussion of possible Rule 23 reforms.

ARGUMENT

1. The Court should rule on the question of mootness rather than deferring to the rulemaking process.

In opposing certiorari, Respondent has argued that the "rulemaking process is likely to be an effective way of ensuring uniformity of practice among circuits." Respondent's Supp. Br. at 2. He has also argued that, to the extent that Petitioner advanced "policy considerations" as a basis for "allowing defendants to avoid class actions through pick-off offers to individual plaintiffs ., the rulemaking process is likely to be a superior way of considering and resolving the competing policy arguments that bear on the question." *Id.*

This argument evinces a clear misunderstanding of the proper scope and role of the rulemaking process. Rulemaking is a consensus mechanism, used to enact changes that are agreeable to a wide number of litigants. It is not generally a means used to resolve live disputes over fundamental Article III principles or interpretation of the FRCP Moreover, rulemaking has traditionally been trans-substantive; the FRCP remain the same regardless of the size or subject matter of the case.

The Rules Enabling Act authorizes the judicial branch to craft procedural rules:

> The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals. *Such rules shall not abridge, enlarge or modify any substantive right.*
>
> 28 U.S.C. § 2072(a)-(b) (emphasis added).

The full rulemaking process is not reflected in the statute, however. In practice, the Court delegates much of its responsibility to the Standing Committee, which itself delegates the discussion and formulation of possible rules to its five advisory committees, which in turn rely upon various subcommittees. As this Court's website explains:

If an advisory committee pursues a proposal, it may seek permission from the Standing Committee to publish a draft of the contemplated amendment. Based on comments from the bench, bar, and general public, the advisory committee may then choose to discard, revise, or transmit the amendment as contemplated to the Standing Committee. The Standing Committee independently reviews the findings of the advisory committees and, if satisfied, recommends changes to the Judicial Conference, which in turn recommends changes to the Supreme Court. The Court considers the proposals and, if it concurs, officially promulgates the revised rules by order before May 1, to take effect no earlier than December 1 of the same year unless Congress enacts legislation to reject, modify, or defer the pending rules.

How the Rulemaking Process Works,
http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works
(last viewed Jul. 22, 2015)

In other words, there are multiple steps to any proposed change to the rules. They must pass through an advisory committee, the Standing Committee, the Judicial Conference, and then this Court and Congress. 28 U.S.C. § 2073(b); *see also* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, & Procedural Efficacy*, 87 GEO. L.J. 887, 892 (1999) (describing process).

Former Advisory Committee members ("alumni," as they call themselves) have stressed that the Rules

process is driven by consensus. *See, e.g.*, Lee H. Rosenthal and John L. Carroll, *Civil Rules Advisory Committee Alumni Panel: The Process of Amending the Civil Rules*, 73 FORDHAM L. REV. 135, 138 (2004) ("So I guess the thesis of all this is the Rules process is really consensus, and if you don't have a consensus, there is really no point in jumping into the Rules process as a vehicle for change."); Bone, *The Process of Making Process*, 87 GEO. L.J. at 916 (Advisory Committee "relies on consensus to resolve normative conflict"). If a proposal is likely to be controversial, it will not survive the Rules promulgation process. *See The Process of Amending the Civil Rules*, 73 FORDHAM L. REV. at 137 (rulemaking process culminating in 1998 amendments involved "the drafting of some very, very interesting and innovative rules, which after the wide-open process was ended resulted only in the promulgation of the Rule authorizing interlocutory appeals in class actions").

Similarly, the alumni also stress that transparency is a priority in the rulemaking process. *Id.* at 136 (process is "deliberately transparent"); Bone, *The Process of Making Process*, 87 GEO. L.J. at 903 (describing changes made to Rules Enabling Act to enable "broad public participation by requiring public hearings, open meetings, publicly available minutes, and longer periods for public commentary"); *see also* 28 U.S.C. § 2073(c)-(d) (providing for open meetings of committee and requiring notice to public). These transparency provisions necessarily add further time and layers to the rulemaking process.

These emphases on consensus and transparency are vital to the advisory committee's proper function. Because it wields a quasi-legislative power, the advisory committees correctly do everything they can to ensure that the thinking about various procedural rules is clear to all, and that no minority need worry about a rival special interest railroading procedural changes through the process. The process of changing the FRCP is rightly slow and deliberate. *The Process of Amending the Civil Rules*, 73 FORDHAM L. REV. at 136 (process "is deliberately slow, it deliberately goes through a lot of layers after opportunity for comment from a lot of sources"). But because it is slow and deliberate, the Advisory Committee on Civil Rules ("Advisory Committee") is not equipped to decide live controversies over how to interpret the FRCP as written.

Moreover, because it relies so heavily on consensus, the Advisory Committee is particularly ill-suited to decide controversial matters like the proper role of Rule 68 as drafted. The Advisory Committee itself noted this difficulty in its May 2, 2015, report to the Standing Committee, which detailed two aborted attempts to amend Rule 68: a withdrawn attempt in 1983-84, and a stillborn attempt in the early 1990s. *See* Hon. David G. Campbell, *Report of the Advisory Committee on Civil Rules*, May 2, 2015, at 19. Both of these attempts failed because of the levels of controversy they generated among various practitioners.

Nor is there any guarantee that the Advisory Committee would actually address Rule 68 in its next set of amendments. While the Respondents cited to a

proposed amendment to Rule 68 in their certiorari opposition, that specific proposal is known as a "concept amendment," offered by the Rule 23 Subcommittee to the Advisory Committee. Indeed, the Rule 23 Subcommittee itself specifically states that its sketches do not mean that any changes will be made. RULE 23 SUBCOMM. REPORT at 2 (April 2015) ("**there is no assurance that the Subcommittee will ultimately recommend any amendments**"). As a result, there is no reason for this Court to defer its judgment on the use of Rule 68 to the Advisory Committee that may itself never issue a formal recommendation for any change.

II. The designation of a case in the pleadings as "class action" does not change the application of either Article III or the Federal Rules of Civil Procedure.

The FRCP are designed to be flexible, and to cover *all* situations that arise in litigation. This principle is embedded in the text of Rule 1, which states the Rules "govern the procedure in all civil actions and proceedings." Fed. R. Civ. P 1. By design, unless otherwise provided, no Federal Rule of Civil Procedure supersedes any other in operation. Rule 23 provides no exception to this basic principle. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 409 (2010) ("A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others."). Indeed, the only permissible exceptions are specifically enumerated in Federal Rule 81, and class actions are not among them.

As a result, even in a class action, procedures under the other FRCP operate normally. Complaints are filed under Rule 8, and motions to dismiss are decided under Rule 12, with reference to Rules 8 and 9. *See, e.g., Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007) (applying Rules 8(a)(2) and 12(b)(6) to antitrust class action); *Tellabs, Inc. v. Makor Issues & Rights Ltd.,* 551 U.S. 308, 320 (2007) (discussing application of Rules 8, 9, and 12 to securities class action).

Similarly, when determining whether summary judgment is appropriate in a class action, courts properly consult Rule 56. *See, e.g., Powers v. Credit Mgmt. Servs., Inc.*, 776 F.3d 567, 571 n.1 (8th Cir. 2015) ("Although a district court must determine whether to certify a class at 'an early practicable time' in the litigation, Rule 23(c)(1)(A), it is not uncommon for a district court to rule on a summary judgment motion that will clarify or simplify the litigation prior to ruling on class certification."); *Schweizer v. TransUnion Corp.*, 136 F.3d 233, 239 (2d Cir. 1998) ("'There is nothing in Rule 23 which precludes the court from examining the merits of plaintiff's claims on a proper Rule 56 motion for summary judgment simply because such a motion' precedes resolution of the issue of class certification.").

Likewise, the requirement of Article III standing applies at all stages of a lawsuit, regardless of how the case is originally designated. *See United States v. Juvenile Male*, 131 S. Ct. 2860, 2864 (2011) (Constitutional challenge to sex-offender registration statute lacked Article III standing); *Lewis v. Cont'l*

Bank Corp., 494 U.S. 472, 477-78 (1990) (Constitutional challenge to banking statute mooted by subsequent amendments).

The FRCP do not authorize courts to deviate from their normal procedure in order to preserve a class action when it would otherwise expire. *Shady Grove*, 559 U.S. at 410 ("compliance of a Federal Rule with the Enabling Act is to be assessed by consulting the Rule itself, and not its effects in individual applications"). So long as each Rule is itself valid under the Rules Enabling Act, a court "must" apply it. *Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987). This Court has stated that class actions are "exceptions" to the ordinary rule of individual litigation. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) ("The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).

However, any exceptional treatment occurs only in the context of a case that has been properly certified under Rule 23 as a class action. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1530 (2013) ("a putative class acquires an independent legal status once it is certified under Rule 23."); *see also Sosna v. Iowa*, 419 U.S. 393, 403 (1975) ("A litigant must be a member of the class which he or she seeks to represent *at the time the class action is certified by the district court*.") (emphasis added); *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) ("Representative suits with preclusive effect on

nonparties include *properly conducted class actions*") (emphasis added).

This balance among the various Federal Rules, where each controls only when its application is required, is vital to our conception of the FRCP as a procedural tool. At its heart, the question of whether an outstanding settlement offer (whether expressed as a Rule 68 offer of judgment or simply as an offer of settlement) moots the claim of a named plaintiff in a class action is a question of when and how parties may settle a lawsuit. As this Court has consistently held, the presence of class allegations does not change the underlying individual character of a pre-certification class action.

Those holdings are entirely consistent with the limitations imposed by the Rules Enabling Act. Under the Act, the Advisory Committee's role is to identify improvements to procedure that have the support of a wide range of practitioners. But the Advisory Committee (and, by extension, the courts) cannot use the Rules to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). That limitation on the Federal Rules is a jurisdictional limitation. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001). The Federal Rules may change the *procedure* followed in a given case, but not the *substance* of the law that is applied. *Shady Grove*, 130 S.Ct. at 1442 (if a rule "governs only the manner and the means by which the litigants' rights are enforced, it is valid; if it alters the rules of decision by which the court will adjudicate those rights, it is not") (citation and internal quotation marks omitted).

The question currently before the Court is one of standing. *Symczyk*, 133 S. Ct. at 1528 (mootness is "corollary to [Article III's] case-or-controversy requirement"). Article III's case-or-controversy requirement is irrefutably substantive. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (standing elements "are not mere pleading requirements but rather an indispensable part of the plaintiffs case"). As a result, it constrains the application of Rule 23. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997); *see also* Fed. R. Civ. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts."). In fact, the case-or-controversy requirement is a "bedrock requirement" of the Constitutional separation of powers, limiting the judicial power to situations where there is a live controversy in front of it, and leaving substantive lawmaking to the legislature. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). Setting that requirement aside when a valid Rule 68 offer of judgment (or a similar settlement offer) would moot a favored class action violates the separation of powers reflected in Congress's delegation of the rulemaking function in the Rules Enabling Act. *Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965) ("To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.").

In other words, the real question in this case is

whether it is more important to keep putative class actions alive after a settlement offer, or to maintain the settled understanding of the case-or-controversy requirement. Given the vital role that the case-or-controversy requirement plays in the separation of powers, and the orderly function of the federal courts, it is clear that styling a case as a "Class Action" cannot suspend the constitutional requirement that there be a live controversy at every stage of the litigation.

III. The Rule 23 Subcommittee's "conceptual sketches" should not serve as even persuasive authority for this Court's decision.

Just as this Court should not defer its judgment to the Advisory Committee, it also should not use the Rule 23 Subcommittee's current "conceptual sketch" as a model its ruling. The content of the current conceptual sketches would have the effect of altering this Court's recent rulings on the proper application of Rule 23, and push (if not trespass) the boundaries of the Rules Enabling Act.

For example, while this Court has ruled that the Rule 23 standard is "stringent" and "in practice exclude[s] most claims," *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013), the Subcommittee's sketches include a new Rule 23(b)(4) that would streamline certification of settlement classes. RULE 23 SUBCOMM. REPORT at 8-16. The Subcommittee has specifically stated that such a rule would be "clearly contrary to" this Court's ruling in

Amchem Products Inc. Windsor, 521 U.S. 591 (1997). *Id.* at 13.

Similarly, despite this Court's ruling that Rule 23's predominance requirement is "demanding," *Behrend*, 133 S. Ct. 1426 at 1432, the Subcommittee's sketches contemplate amending Rule 23(b)(3) to ensure that a class action that is not otherwise certifiable may proceed as to a single issue. RULE 23 SUBCOMMITTEE REPORT at 29-31. Such an amendment would effectively eviscerate Rule 23's predominance requirement as it currently stands, even though this Court has made clear that the predominance requirement is necessary to ensure due process. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011).

The Subcommittee is also considering formally recognizing the role of *cy pres* relief in class settlements. RULE 23 SUBCOMM. REPORT at 17-22. The Subcommittee concedes that, as written, its draft raises "Enabling Act issues" because it "goes beyond what the Enabling Act allows a rule to do." *Id.* at 19 & n.36. It also recognizes that there is likely no statutory authority for *cy pres* relief. *Id.* at 18 n.33; *see also* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §3.07 (2010). See generally, Martin H. Redish, Peter Julian, and Samantha Zyont, *Cy Pres Relief & the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010). Nonetheless, it purports to offer a method of allocating class members' relief to a designated third party

The Subcommittee's treatment of offers of

judgment (or other early settlement offers, similar to the one that Petitioners made in this case) under Rule 23 is no different than these other ideas. It contemplates either (1) amending Rule 68 to render it inapplicable to class actions brought under Rule 23, or (2) amending Rule 23(e) to require judicial approval of any individual plaintiff settlements. RULE 23 SUBCOMM. REPORT at 26-29. These sketches, if adopted, would fly in the face of this Court's repeated, unanimous rulings that class actions are individual lawsuits until such time as they are certified for class treatment. *See Taylor*, 553 U.S. at 983; *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011) (class action denied certification is not "properly conducted" class action); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013) ("a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified"). In fact, in 2003, the Advisory Committee amended Rule 23(e) to make clear that named-plaintiff-only settlements do *not* require court approval. FED R. CIV. P. 23(e)(1)(A), advisory committee's notes (2003).[2]

These sketches are designed to spark debate, and so they are deliberately provocative. This is a useful tactic: staking out an extreme position at the beginning of a long debate gives all sides something concrete for comment, and reduces wheel spinning.

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[2] While the ALI has suggested reinstating judicial oversight, its reason was to prevent plaintiffs from leveraging a class action designation in the complaint into a larger individual settlement. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.02, Reporters Notes, cmt. b.

But what makes these proposals useful in the context of a transparent, years-long process of building consensus around any possible changes is exactly what makes them ill-suited for reference in a currently pending controversy regarding application of the FRCP as written.

CONCLUSION

The Court should decide this case, rather than deferring—either formally or as a practical matter—to the Rules Enabling Act process. Because the FCRP are trans-substantive, Rule 68 applies to all cases, including those styled as class actions. Only the proper certification of a class under Rule 23 can change the character of a lawsuit from one prosecuted by an individual on her own behalf to one on behalf of persons not present before the court. It is for this reason that the Court should reverse the Circuit Court of Appeals for the Ninth Circuit.

Respectfully Submitted,

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IN THE

Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA, THE CENTER FOR PUBLIC REPRESENTATION, NATIONAL HEALTH LAW PROGRAM, ADVOCATES FOR BASIC LEGAL EQUALITY, INC., JUSTICE IN AGING, WESTERN CENTER ON LAW AND POVERTY, LEGAL AID JUSTICE CENTER, AND PUBLIC JUSTICE CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*

Amici are not for profit legal services and civil rights organizations that often represent classes certified pursuant to Fed. R. Civ. P 23(b)(2) seeking to enjoin violations of federal statutory and constitutional rights.[1]

The **Legal Aid Society of the District of Columbia** (Legal Aid) was formed in 1932 to provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs. Legal Aid Bylaws, Art. II § 1. Legal Aid is the oldest and currently largest general civil legal services provider in the District of Columbia advocating on behalf of its clients to preserve affordable housing, ensure access to critical safety net benefits, protect consumer rights, and keep families safe and stable. In addition to handling individual, direct representation cases, Legal Aid also litigates class action matters to enforce federal statutory and constitutional rights on behalf of people living in poverty.

The Center for Public Representation (the Center) is a national public interest law firm with

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[1] All parties have consented to this brief by filing letters consenting to submission of *amicus* briefs in support of either side. No party or counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund preparation or submission of this brief. No person other than *amici*, their members, or their counsel made such a monetary contribution.

offices in Northampton and Newton, Massachusetts, that advocates for the rights of children and adults with mental illness, intellectual and developmental disabilities and brain injuries. For more than forty years, the Center has represented its clients in dozens of states in cases related to entitlement to appropriate integrated community based services, fair housing rights, inappropriate nursing home placements, involuntary commitment, and conditions in prisons and juvenile justice facilities.

For over 45 years, the **National Health Law Program** (NHeLP) has engaged in litigation and policy advocacy on behalf of low-income people, older adults, people with disabilities, and children. NHeLP also conducts research and provides education on a range of issues affecting these populations, including health insurance coverage and access to the courts. When clients are being harmed, NHeLP works through the courts to enforce legal rights that are set forth in public benefits and civil rights laws.

Advocates for Basic Legal Equality, Inc. (ABLE) is a regional non-profit law firm that provides a full range of free, high quality legal services to low-income individuals and groups to help them achieve self-reliance, economic opportunity, and equal justice. ABLE serves clients in thirty-two counties in Northwest and Western Ohio as well as migrant farmworkers and immigrant workers throughout Ohio. Established in 1969, ABLE has a long history of representing low-income clients in all types of complex civil litigation, including numerous class action cases. ABLE's work covers the areas of

housing, public benefits, civil rights, and education and, since its founding, it has utilized systemic litigation and impact advocacy as a method to achieve greater success for low-income clients with long-term results.

Justice in Aging (formerly known as the National Senior Citizens Law Center) is a non-profit legal services organization that since 1972 has used the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources. It provides representation to classes of poor seniors seeking access to Social Security Act federal benefits programs, including Medicare; Medicaid; Old Age, Survivors' and Disability Insurance; and Supplemental Security Income.

The **Western Center on Law and Poverty** (WCLP) is the oldest and largest statewide support center for legal aid advocates in California. WCLP regularly litigates class actions and other cases of broad impact in federal and state court primarily to enforce the rights of low-income people regarding the public programs and systems they use to maintain health, housing and socioeconomic stability. The ability to obtain class-wide injunctive relief where warranted is essential to WCLP's work.

The **Legal Aid Justice Center** provides free legal representation for low-income individuals in Virginia. Its mission is to serve those in our communities who have the least access to legal resources and to address the root causes of poverty through local and statewide organizing, education,

and advocacy. It has handled multiple class action cases on behalf of public housing residents, prisoners, immigrants, and low-wage workers, among others.

The **Public Justice Center** (PJC), a non-profit civil rights and anti-poverty legal advocacy organization founded in 1985, has a longstanding commitment to protecting the rights of Maryland residents whose access to the courts is severely limited by the very nature of their claims and their life circumstances, including low- and moderate-income consumers, low-wage workers, low-income tenants, homeless students, prisoners, and persons eligible for government-administered subsistence income. The PJC uses litigation, including class actions and appeals in state and federal courts, legislative and administrative advocacy, and public education to address structural and systemic economic, racial and other inequities.

Amici will address the first question presented in the context of class actions seeking injunctive relief.

SUMMARY OF ARGUMENT

Petitioner's narrow complaints about Telephone Consumer Protection Act (TCPA) class actions cannot justify broadly disrupting Article III case or controversy doctrine. The kind of doctrinal upheaval that would be required to dismiss class actions based on unaccepted individual offers to the named plaintiffs cannot be limited to class actions primarily seeking damages under the TCPA or similar statutes. It would also threaten actions to enforce federal statutory and constitutional rights

like those brought by *amici*. Injunctive class actions are efficient and equitable ways to redress acts or failures to act in violation of federal law affecting large groups. Impairing the efficacy of such class actions by empowering defendants to impose individual settlements on named plaintiffs against their will would weaken the private enforcement of civil rights laws on which Congress has long relied.

The Constitution should not be pressed into service to permit class action defendants—or any defendants—to force the dismissal of a complaint just by making a unilateral and unaccepted settlement offer before a class certification motion has been filed. An unaccepted offer provides no redress. An *offer* of an injunction, in particular, is not an injunction. Such an offer does not, therefore, moot the case by making judicial redress impossible. A court has no authority to force the plaintiff to accept a settlement offer under Fed. R. Civ. P 68. Nor can a court enter an unaccepted offer of judgment as if it were a default; Rule 68 encourages settlement by imposing costs on a party that unwisely rejects an offer of judgment, not by turning an offer into a *diktat*.

Even if an offer of "complete" relief could moot a case, the kind of general, no-fault injunction offered here does not provide full relief. Full relief requires a determination that particular conduct is unlawful and an injunction forbidding the conduct. Full relief enables a plaintiff to seek contempt sanctions if the defendant repeats the conduct, and the only issue in the contempt proceedings would be whether the defendant engaged in the same prohibited conduct. Moreover, other victims of the same conduct would be

able to invoke the judgment to preclude the defendant if it engages in the same conduct as to them; they would not have to re-litigate whether the conduct is a violation of the statute. The offered injunction here expressly disclaimed any admission of liability, and its operative term (forbidding violation of the TCPA) fails to prohibit repetition of the very conduct alleged in the complaint because *whether* the TCPA forbids that conduct remains unresolved, leaving the plaintiff and any other victims to litigate the whole question of the legality of the conduct anew. A general, no-fault injunction, therefore, does not resolve the claim presented by the plaintiff or afford full relief on the claim.

ARGUMENT

The case or controversy requirement of Article III is the bedrock of the judicial branch. Shifting that bedrock to crush an unwelcome "cottage industry of attorneys" pursuing TCPA or similar claims (*see* Pet'r Br. 4) is likely to produce serious and unintended doctrinal consequences. The effects of concluding that a defendant can moot a case by making a settlement offer that the plaintiff rejects may be felt in many areas of the law, including class actions seeking injunctive relief to redress statutory and constitutional violations.

Petitioner's fundamental submission is that there is no longer a justiciable controversy when the defendant has offered an ostensibly complete settlement, even though the plaintiff has not accepted the offer and continues to seek relief from the court. That proposition seemingly would apply to

an action for injunctive relief as well as to an action for damages. As an initial matter, an unaccepted offer—even of generous and seemingly full relief—does not divest a district court of the ability to order relief. But even if tendering a sum of money might seem the close equivalent of actually paying money in settlement, the offer of an injunction is not the close equivalent of an injunction, especially when the terms of the injunction are not the result of the exercise of equitable discretion in light of adjudicated facts establishing the defendant's liability.

If Petitioner were correct that a defendant's unaccepted offer of relief could moot a case, then defendants in injunctive actions could avoid adjudication of meritorious constitutional and statutory claims just by offering injunctive relief to the named plaintiffs in Fed. R. Civ. P 23(b)(2) class actions before a certification motion has been filed, even though the unaccepted offers would not provide any actual relief. Moreover, if the kind of "no fault" injunction offered in this case were deemed an offer of complete relief, defendants could moot injunctive class actions without even satisfying the established standard for mootness based on the voluntary cessation of illegal conduct, leaving plaintiffs without adequate protection against resumption of the illegality.

Suppose, for example, that a real estate agency steered a black family away from available housing in a predominantly white neighborhood according to what seemed to be its standard practice. If the family sued on behalf of a class to enjoin such unlawful discrimination, the real estate agency could

not force dismissal of that lawsuit merely by offering (whether under Fed. R. Civ. P. 68 or otherwise) to consent to an injunction in favor of the named plaintiffs requiring the agency to comply in the future with the Fair Housing Act, but declining to admit any of the allegations in the complaint or that its prior conduct violated the Act. The unaccepted *offer* would not moot the case because a court could not enter the injunction without determining liability unless the parties agreed to it as a condition of dismissal under Fed. R. Civ. P. 41. And even if the offer were somehow treated as unilaterally binding on the defendant, it would not moot the case as a form of voluntary cessation because the general terms of the proposed injunction would not forbid repetition of the unlawful conduct with the required specificity in light of the agency's refusal to acknowledge that it had violated the Fair Housing Act.

The settlement offer in this case did not moot it for the same reason. The TCPA authorizes injunctive relief, 47 U.S.C. § 227(b)(3)(A), the class action complaint in this case sought injunctive relief, and Petitioner's offer of judgment and settlement offer included an injunction. JA 23 (complaint); Pet. App. 53a (offer of judgment), 55a-56a (proposed stipulated permanent injunction), 58a-59a (settlement offer). But like the Fair Housing Act hypothetical above, the offer of an injunction in this case came without an acknowledgement that Petitioner had violated the TCPA, or a specific prohibition against engaging in the same conduct in the future. Pet. App. 56a. That kind of no-fault injunction is not complete relief.

A. Unaccepted Offers of Injunctions Do Not Redress Injuries.

"To invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable decision." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (citations omitted), *quoted in Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013). A case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin*, 133 S. Ct. at 1023 (quoting *Knox v. SEIU*, 132 S. Ct. 2277, 2287 (2012)). That is, if the plaintiff had Article III standing to begin with, a settlement offer moots the case if it makes redress by a favorable decision impossible.

Petitioner's settlement offer did not make it impossible for the district court to grant relief. "When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before." *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523, 1533 (2013) (Kagan, J., dissenting). In particular, a rejected offer of a stipulated injunction (even one providing greater relief than the one Petitioner offered in this case) has no real world effect on the rights and obligations of either party; it neither obligates the defendant nor protects the plaintiff from future injury.

As Justice Rehnquist noted in his concurring opinion in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), a putative class action "is moot in the Article III sense only if this Court adopts a

rule that an individual seeking to proceed as a class representative is *required* to accept a tender of only his individual claims." *Id.* at 341 (emphasis added). The Court has never adopted such a rule, and could not do so without giving the defendant the "practical power" to prevent class certification in every case. *See id.*[2] That would be contrary to *Roper*, where the Court held that the class representatives' individual interest in the litigation was "sufficient to permit their appeal of the adverse class certification ruling," *id.* at 340, notwithstanding the defendant's tender of a judgment in favor of the class representatives on their individual claims and the district court's actual entry of the tendered judgment. It follows *a fortiori* from *Roper* that a putative class representative retains a constitutionally sufficient interest in the district court's initial consideration of a motion to certify the action as a class action, notwithstanding a rejected settlement offer.

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[2] By contrast, in *California v. San Pablo & Tulare Railroad Co.*, 149 U.S. 308, 313 (1893), the State, as a matter of state law, could not refuse the railroad's tender of full payment of "the sums sued for in this case, together with interest, penalties, and costs." *See* Pet'r Br. 14 n.3 & 16-19. Thus, the tenders in *San Pablo* and *San Mateo County v. Southern Pacific Railroad Co.*, 116 U.S. 138, 142 (1885) were accepted. Full payment of a debt (together with payment of any penalties and interest specified by law for late payment) moots a case by extinguishing the cause of action to collect an unpaid debt. *San Mateo*, 116 U.S. at 142 ("there is no longer an existing cause of action in favor of the county against the railroad company."); *San Pablo*, 149 U.S. at 313 (writ of error "must be dismissed, because the cause of action has ceased to exist."). Petitioner's unaccepted settlement offer, by contrast, did not eliminate the TCPA injuries alleged in the complaint (annoyance and the monetary cost of receiving the unwanted message) nor the plaintiff's cause of action.

Roper also forecloses by necessary implication Petitioner's submission that a district court can render a case moot by entering judgment according to the terms of the defendant's rejected settlement offer. (Pet'r Br. 21). That is exactly what the district court did in *Roper*, and what this Court held did not moot the appeal of the denial of class certification. Petitioner's argument that a district court has the authority to enter such a judgment (that is, to exercise jurisdiction over a dispute) based on a rejected settlement offer because of its equitable authority to dispose of moot cases (which are beyond the court's jurisdiction) is paradoxical. *Cf. Asarco, Inc. v. Kadish*, 490 U.S. 605, 620 (1989) ("It would be an unacceptable paradox to exercise jurisdiction to confirm that we lack it."). Power to dispose of a moot case is not power to moot a case by disposing of it.[3]

Because an unaccepted settlement offer does not alter the legal rights and duties of the parties by its own force, and the court can neither compel the plaintiff to accept the settlement nor enter its own judgment absent a settlement, such an offer cannot make it impossible for a court to grant relief.

Even if the impulse "to refuse to 'expend judicial and litigation resources resolving the merits of a claim the defendant informs the Court it will fully satisfy'" (Pet'r Br. 19) (quoting U.S. Br. 13, *Genesis HealthCare*)) is understandable, the Court

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[3] Nor can a court enter a judgment offered (but not accepted) under Rule 68 as if it were a default judgment, as authorized in *McCauley v. Trans Union LLC*, 402 F.3d 340 (2d Cir. 2005). A default is an admission of liability; a party that offers to settle while disputing liability has not defaulted.

should not deviate from its Article III precedents to target class action litigation under the TCPA and similar laws. To begin with, this Court has been reluctant to allow a party to thwart a determination of its liability by unilateral action. That is one reason for the "formidable burden" of the voluntary cessation doctrine, *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013), and for the different treatment of *vacatur* when a case is mooted by a settlement rather than by happenstance. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership.*, 513 U.S. 18 (1994). A party that has violated federal law should not be able to avoid adjudication of its liability by imposing a settlement on an unwilling plaintiff.

There is no reason to distort Article III mootness doctrine in order to control seemingly unreasonable refusals to settle. To be sure, plaintiffs, no less than defendants, can make unreasonable judgments about the strength of their positions. Plaintiffs can refuse fair settlement offers and persist in futile litigation efforts, just like defendants. Addressing that kind of conduct is the everyday work of trial judges, and courts have many tools available to encourage appropriate settlements. Not the least of these tools is Fed. R. Civ. P. 68, which creates a strong incentive to accept a reasonable settlement offer. But the consequence for a party under that Rule of refusing to accept an offer is paying the other side's costs if the party fails to win a more favorable judgment, not dismissal of the lawsuit. *See Chapman v. First Index, Inc.*, Nos. 14-2773 & 14-2775, 2015 WL 4652878, at *3 (7th Cir. Aug. 6, 2015); *Hooks v. Landmark Indus., Inc.*, No. 14-20496, 2015 WL 4760253, at * 3 (5th Cir. Aug. 12,

2015); *Bais Yaakov of Spring Valley v. ACT, Inc.*, No. 14-1789, 2015 WL 4979406, at *5 (1st Cir. Aug. 21, 2015).

Nor is there a good reason to require putative class representatives to accept settlement offers that would satisfy their individual claims but leave the class with nothing. Class certification is an efficient way of resolving litigation involving the same action or failure to act in violation of law affecting many individuals. Class representatives should be scrupulous about the interests of the class they seek to represent in a lawsuit filed as a class action even before certification. The typicality and adequacy requirements in Fed. R. Civ. P 23(a) favor the selection of a class representative who will insist on relief for the entire class (and will therefore reject an individual settlement). For example, in a (b)(2) class action challenging the procedure used to terminate a property interest in government benefits, a putative class representative might reject a settlement offer that would grant her individual relief by restoring the terminated benefits but that would leave the class-wide violation unremedied. The heavy constitutional artillery of Article III should not be deployed for the purpose of discouraging class certification by requiring class representatives to accept settlements of their individual claims without regard to the class.

B. No-Fault Injunctions Do Not Provide Complete Relief.

Even if an unaccepted offer of complete relief could moot a case, the offer of a no-fault injunction

does not provide complete relief.[4] Unlike an injunction (or other relief) entered by default, the injunction Petitioner offered did not determine whether the conduct alleged in the complaint violated the TCPA, and hence failed to prohibit the repetition of that very conduct by generally forbidding future TCPA violations.

Because the offered Injunction simply restates an existing statutory prohibition, it does not offer any more specific protection than the TCPA itself.[5] In the absence of a determination that Petitioner's transmission of text messages to Gomez and the rest of the proposed class violated the TCPA, the Injunction would not even stop Petitioner from engaging in the very same conduct again. At the very least, the district court would have to decide the same question of TCPA liability presented in the complaint before it could enforce the Injunction—which is precisely why that liability question would not be moot. As in *Knox*, 132 S. Ct. at 2287-88,

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[4] Contrary to Petitioner (e.g., Br. 7), there was no finding of complete relief below. The district court merely accepted Petitioner's undisputed claim that its Rule 68 offer of judgment would have provided complete relief. Pet. App. 40a. The court of appeals did not examine the completeness of the relief offered, and did not even mention the prayer for an injunction. *Id.* at 3a, 5a-6a.

[5] Petitioner offered to "consent[] to the entry of this Stipulated Permanent Injunction without admitting any liability or admitting any allegations in the complaint." Pet. App. 56a. Moreover, Petitioner agreed "to an injunction barring it from using automated telephone equipment to send text messages to mobile phones in violation of the TCPA," but "is not prohibited from sending text messages as otherwise permitted by the TCPA." *Id.*

where this Court declined to find mootness based on the SEIU's refund of fees, Petitioner's refusal to admit wrongdoing, and the uncertainty about how the relief would be implemented mean that a live case or controversy persists.

1. An injunction that does not determine liability does not provide complete relief.

A judgment that does not adjudicate the defendant's liability for the conduct alleged in the complaint does not provide complete relief. As the Court stated in a related context, "[t]he prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defense set up by the party pursued." *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 406 (1900). The adjudication of cases and controversies involves more than the judicial reassignment of money or property from one party to another. The court's most fundamental task is to give reasons for granting material relief by determining a claim that a legal right has been violated. Ordinarily, such a determination of liability is inherent in the issuance of an injunction. Rule 65(d)(1)(A) requires every injunction to include "the reasons why it issued." Except for a consent judgment, those reasons must include either a determination by the court or, if the defendant defaults, an admission by the defendant, of an actual or threatened violation of a legal right—*i.e.*, a determination of liability.

Moreover, when there is a justiciable case or controversy at the outset, the redress available to the

plaintiff includes a determination of legal rights, "whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 243-44 (1937) ("on repudiation by the insurer of liability in such a case and insistence by the insured that the repudiation was unjustified because of his disability, the insured would have 'such an interest in the preservation of the contracts that he might maintain a suit in equity to declare them still in being.'") (citations omitted); *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270 (1941) (jurisdiction over insurer's suit to determine its obligations under policy); *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 126 (2007) (noting Court's acceptance of jurisdiction to provide declaratory relief).[6]

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[6] The Seventh Circuit's holding in *Chathas v. Local 134 IBEW*, 233 F.3d 508 (7th Cir. 2000), that an unaccepted offer of judgment mooted a complaint for injunctive relief, is no longer good law in light of *Chapman v. First Index, Inc.*, 2015 WL 4652848 (7th Cir. Aug. 6, 2015). *Chathas* was mistaken, in any event, in asserting that a plaintiff was not entitled to insist (as a reason for refusing an offer of a permanent injunction) on a determination of the defendant's liability because a defendant can default. *See Chathas*, 233 F.3d at 512 (citing *Reynolds v. Roberts*, 202 F.3d 1303, 1315 (11th Cir. 2000)). A default is a binding admission of liability in that case, even if some authorities treat defaults as not issue preclusive in other litigation. Restatement (Second) of Judgments § 27 cmt. e (1982); *but see In re Catt*, 368 F.3d 789, 791-92 (7th Cir. 2004) (noting authority giving preclusive effect to default judgments). In *Genesis HealthCare*, petitioner's counsel assured the Court that if the district court had entered the judgment offered in that case under Rule 68, the judgment would have a preclusive effect with regard to FLSA claims of other potential members of a collective action. Oral Arg. Tr. 3-5, Dec. 3, 2012.

Even before the Declaratory Judgment Act, a party could seek a judgment for nominal damages to determine legal rights in a form that would be preclusive in any future dispute between the parties. Dan B. Dobbs, Handbook of the Law of Remedies § 3.8, at 193 (1973). In *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997), the Court assumed that an unsatisfied prayer for nominal damages would have been sufficient to avoid mootness, but concluded that such relief was "nonexistent" in that case because of the State's constitutional immunity. The purpose of a nominal damages award was to declare and determine legal rights. For example, courts historically awarded nominal damages to declare the falsity of a defamatory publication, even in the absence of any actual and compensable harm to reputation. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 765 (1985) (White, J., concurring in the judgment).

This Court has also recognized in other contexts that—once a justiciable controversy exists—a party can have an interest in a legal ruling resolving that controversy, wholly apart from any award of material relief. In *Camreta v. Greene*, 563 U.S. 692, 131 S. Ct. 2020 (2011), the Court held that the dismissal of damages claims against a child protective services worker on the basis of qualified immunity did not moot an appeal of a lower court ruling that the worker's conduct was unconstitutional. The Court ruled that the worker retained a live personal stake in the legal rule governing his future conduct. *Id.* at 2029. In other words, the Court determined that the worker had the required interest in obtaining additional redress on

appeal by changing the legal rule applicable to his future conduct, even though the case against him seeking damages had been dismissed on summary judgment.[7] By the same reasoning, both a person who alleges injury from the defendant's violation of the TCPA and the defendant alleged to have committed such a violation have a live interest in establishing the correct standard to govern future communications.

2. An injunction that does not specifically forbid repetition of the conduct alleged in the complaint does not provide complete relief.

The purpose of an injunction is to prevent future violations of a legal right. Consequently, an appropriate injunction in a TCPA case would forbid the defendant from engaging in the conduct determined to violate the TCPA, not just restate the existing statutory prohibition. Rule 65(d)(1) requires "[e]very order granting an injunction" to "(C) describe in reasonable detail the act or acts restrained or required." *Chathas*, 233 F.3d at 512-13 (holding omission harmless because specific prohibitions were contained in earlier preliminary injunction that was made permanent). That is "no mere technical requirement[]." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974).

Typically, a court crafts an injunction to restrain particular conduct that has been shown to be

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[7] That case was nonetheless moot because the plaintiff no longer had a personal stake in the outcome. *Id.* at 2034.

unlawful after trial, or that seems likely to be unlawful (for a preliminary injunction). The specifics of injunctive relief flow from the nature of the violation of law at issue. For example, a court would not prohibit a government from terminating property rights to certain government benefits without notice by issuing an injunction to comply generally with the Due Process Clause; nor would a court prohibit a failure to accommodate persons with disabilities by a bare injunction to comply with the Americans with Disabilities Act.

In combination with Petitioner's explicit refusal to admit a violation, the failure to specify in the injunction it offered what conduct is prohibited leaves the plaintiff exposed to repetition of the same illegal conduct. It is as if, upon the SEC's refusal to settle an action seeking injunctive relief against securities fraud without an admission of liability, a court were to dismiss the SEC's complaint on the basis of the defendant's offer to settle for an injunction against future violations of Rule 10b-5 without admitting a past violation or identifying what specific conduct would be forbidden in the future. While the SEC certainly could agree to such a disposition, it could also insist on more. When a party could legitimately seek additional relief, the relief offered in a settlement is not complete.

An unaccepted offer of injunctive relief in settlement can be regarded, at most, as a kind of *conditional* voluntary cessation, because the settlement offer is no longer binding once it has been refused (and expires as a matter of law if made under Rule 68). An offer that would not meet the standard

for voluntary cessation if based on the defendant's unilateral action cannot moot a case.

The point is illustrated by *Already, LLC*. Nike unilaterally issued a covenant that it would not enforce the trademark that Already sought to invalidate with regard to any shoe Already planned to manufacture. The Court held that Nike's covenant mooted the case because it was irrevocable, unqualified, and comprehensive.

Suppose that, instead of unilaterally issuing a covenant, Nike had offered to consent to an injunction with the same terms. Putting to the side the difference between the offer of an injunction and the entry of an injunction discussed in Part A, the question would remain whether the terms of the injunction really ended the threat of future injury. If the injunction mirrored the covenant, then presumably it would provide complete relief. But an offered injunction that simply prohibited Nike from wrongfully asserting trademark infringement—without specifying what trademark claims it would refrain from asserting—would not provide complete relief because it would not assure that Already could manufacture shoes without the threat of a future Nike infringement claim. The same is true of the kind of no-fault injunction offered in this case.

CONCLUSION

The Court should dismiss the writ as improvidently granted as to the first question presented or answer it "no"; it should reserve the second question for a case in which it is presented.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL BLACK CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The *amicus curiae* addresses the second of the three questions presented in this case:

1. Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim.

2. Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified.

3. Whether the doctrine of derivative sovereign immunity recognized in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), for government contractors is restricted to claims arising out of property damage caused by public works projects.

RULE 29.6 STATEMENT

Amicus curiae National Black Chamber of Commerce has no parent company, and no publicly held company owns 10 percent or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Black Chamber of Commerce is a nonprofit, nonpartisan organization dedicated to the economic empowerment of African-American communities through entrepreneurship. Incorporated in 1993, it represents nearly 100,000 African-American-owned businesses and advocates on behalf of the 2.1 million Black-owned businesses in the United States. The Chamber has 190 affiliated chapters located throughout the nation, as well as international affiliates in, among others, the Bahamas, Brazil, Colombia, Ghana, and Jamaica. The Chamber regularly files *amicus curiae* briefs in cases like this one that raise issues of concern to the nation's Black business community.

INTRODUCTION AND SUMMARY OF ARGUMENT

The *amicus curiae* agrees with the petitioner that an offer of complete relief that fully satisfies a plaintiff's claims eliminates that plaintiff's personal stake in litigation and therefore renders her case moot. That result is not and cannot be altered by the mere presence of class allegations, for three reasons.

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[1]Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

First, no source of law gives named plaintiffs a substantive right to pursue class claims. To the contrary, the Rules Enabling Act specifically precludes federal procedural rules from enlarging substantive rights, and Rule 23 is consistent with the Act, establishing procedures for aggregate litigation without altering the substantive rights or obligations of any party. Nonetheless, the contrary conclusion of the dissenting opinion in *Genesis Healthcare v. Symcyzk*, 133 S. Ct. 1523 (2013), although unsupported by any reasoning or precedent, has proven persuasive to many lower courts. Correction of this mistaken view of the law is necessary to give proper effect to Congress's careful delineation of money-damages provisions in remedial statutes like the the Telephone Communications Protection Act that were framed with individual enforcement in mind.

Second, application of the "relation-back" doctrine would be inappropriate and unnecessary here. While the Court's decisions do allow the claims of a class whose certification has already been adjudicated to survive the subsequent mootness of the named plaintiff's claims in certain limited circumstances, the named plaintiff here had not even moved for certification at the time his claim was mooted. Moreover, the policy rationales underlying the "relation-back" doctrine are not implicated. The claims at issue here are not the kind of inherently transitory claims that might otherwise prove unreviewable, and settlements with individual plaintiffs would fur-

ther, rather than retard, Congress's purposes in providing a remedy to individual injured parties.

Finally, any result other than dismissal of this action for want of a live controversy would raise serious constitutional concerns under Article III similar to those that motivated the Court's decision to hear *Spokeo, Inc. v. Robins*, No. 13-1339. A named plaintiff whose own claim has been extinguished by an offer of complete relief lacks both the injury in fact and related remedy that are requisite to Article III adjudication. Such a plaintiff may not, of course, rely on the interests of third parties (*i.e.*, putative class members) or byproducts of the litigation itself (*e.g.*, the prospect of an incentive award) to provide a live controversy. Particularly in these circumstances, enforcement of Article III's requirements is important to restrict class actions to actual controversies involving the interests of the plaintiffs whom Congress sought to protect, rather than hypothetical disputes implicating only the interest of plaintiffs' attorneys in extracting windfall fee awards.

For these reasons, and those contained in the petitioner's brief, the decision of the court of appeals should be reversed.

ARGUMENT

I. Named Plaintiffs Have No Substantive Right to Pursue Class Claims

Class allegations do not create a substantive right to pursue class claims. The recognition of such a right cannot be squared with the Rules Enabling Act or the text and history of Rule 23, much less this Court's decision in *Genesis Healthcare Corp. v. Symcyzk*, 133 S. Ct. 1523 (2013). Unfortunately, the contrary conclusion of the dissent in *Genesis Healthcare* has led more than a few lower courts astray on this point. *See id.* at 1536 (Kagan, J., dissenting). The Court should correct that mistaken view.

A. Rules Promulgated Pursuant to the Rules Enabling Act Cannot Confer on a Named Plaintiff the Substantive Right to Pursue Class Claims

The Rules Enabling Act could not be clearer that rules promulgated pursuant to its authority "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). What this means is that rules must "really regulat[e] procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 14 (1941). The governing test is therefore "what the rule itself regulates: If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is val-

id; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality op.) (quoting *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 446 (1946)).

As a plurality of the Court explained in *Shady Grove*, the *sine qua non* of a permissible procedural rule is that, while it may regulate "the process for enforcing [the parties'] rights," it does not "alter[] the the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either." *Id.* at 407–08 (surveying cases).

The view that Rule 23 allows a named plaintiff whose own claim is moot to seek remedies on behalf of putative class members fails that test, in two respects. To begin with, empowering a named plaintiff in a class action to proceed despite the absence of any continuing personal interest she may have in the litigation necessarily "alter[s]...the rights themselves." If a plaintiff's own claims are moot, any right to recovery on those claims she may have had is necessarily extinguished. *Spencer v. Kemna*, 523 U.S. 1, 18 (1998) ("[M]ootness, however it may have come about, simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so."). Allowing a plaintiff to nonetheless continue the litigation, notwithstanding the mootness of her own claims, depends on the assumption that the plaintiff has some legally cognizable interest—that is, a right—in the claims of putative class members.

Ashcroft v. Mattis, 431 U.S. 171, 172–73 (1977).[2] But that is precisely the kind of substantive right that the Rules Enabling Act precludes rules from conferring. Likewise, if recognizing a named plaintiff's interest in others' claims is somehow sufficient to deflect a mootness challenge, then it also impermissibly alters the remedies available to that plaintiff.

A comparison with the challenge to application of Rule 23 in *Shady Grove* is instructive. Rule 23's authorization of class actions to enforce state law not subject to class litigation in state court was properly procedural, the plurality opinion found, because, "like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged." 559 U.S. at 408. By contrast, the application of Rule 23 at issue here would allow a named plaintiff to avoid dismissal due to the failure of her own claim. In other words, the rule of decision is so significantly altered that the decision is precisely the reverse. That shift is not one that could be fairly described as procedural.[3]

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[2] Of course, such a plaintiff would not have a legally cognizable interest. *Mattis*, 431 U.S. at 173 (holding claim moot after resolution of damages claim because "[e]motional involvement is a lawsuit is not enough to meet the case-or-controversy requirement").

[3] It should be noted that the approach taken by the concurring justice in *Shady Grove* is identical in all respects material to the instant case. *See* 559 U.S. at 410–11 (explaining disagreement with concurrence); *id.* at 418–20 (Stevens, J., concurring) (arguing that, to determine whether a federal rule "enlarges"

In sum, the proposition that Rule 23 confers a right to pursue class claims, or otherwise alters the mootness inquiry in these circumstances, is incompatible with the Rules Enabling Act's bar on enlargement of substantive rights.

B. Rule 23 Provides No Substantive Right To Pursue Class Claims

Consistent with the Rules Enabling Act, Rule 23 does not create any substantive rights for plaintiffs to assert putative class claims. Rule 23 does no more than potentially allow large numbers of plaintiffs—all with actual standing and who satisfy the procedural requisites—to aggregate their claims in a single action. In other words, it "merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove*, 559 U.S. at 408.

The non-substantive character of Rule 23 is apparent in its text. Rather than confer any right, it provides only that, in certain circumstances, "members of a class may sue or be sued as representative parties." Fed. R. Civ. P 23(a). Indeed, far from conferring additional rights on representative parties, it places burdens on them, requiring most basically

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substantive rights under state law, a court ought first to consider whether the allegedly conflicting state law is procedural or substantive in nature).

that they "fairly and adequately protect the interests of the class" as well as do other specific things. Fed. R. Civ. P. 23(a)(4). Nowhere does it so much as imply that a representative party has an interest in other class members' claims; to the contrary, it recognizes, and requires courts to take into account, other "class members' interests in individually controlling the prosecution or defense of separate actions." Fed. R. Civ. P. 23(b)(3)(a).

The Rule's non-substantive character was by design. The current approach to "common question" class actions was conceived as part of the 1966 Amendments to the Federal Rules of Civil Procedure as procedural means to enable the mass joinder of individual claims—and nothing more. The Advisory Committee took that view when it formalized class litigation by drafting Rule 23. Its object was not to create a class action cause of action but rather to provide "advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party." Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (i), 81 Harv. L. Rev. 356, 390 (1967). *See also Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (holding "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims" because that would alter the defendant's substantive rights). After all, it was understood that "[t]he interests of individuals in conducting separate

lawsuits may be so strong as to call for denial of a class action." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 616 (1997) (quoting Adv. Comm. Notes, 28 U.S.C. App., p. 698).

Accordingly, the Court's reasoning in *Genesis Healthcare* regarding the Fair Labor Standards Act's similar collective-action procedure is fully applicable to class actions under Rule 23. While Rule 23, like Section 16(b) of the FLSA, 29 U.S.C. § 216(b), authorizes a plaintiff to bring an action on behalf of herself and others similarly situated, "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." 133 S. Ct. at 1529. That is because the plaintiff, when her own individual claim becomes moot, "lack[s] any personal interest in representing others in this action." *Id.* To be sure, "a class action is not rendered moot when the named plaintiff's individual claim becomes moot after the class has been duly certified," but that rule does not save the named plaintiffs' claim and, in any instance, turns on "the fact that a putative class acquires an independent legal status once it is certified." *Id.* at 1350.

Nonetheless, the court below distinguished *Genesis Healthcare* on the sole ground that it arose under the collective action procedures of FLSA, whereas Rule 23 solely governs the class procedures here. Pet. App. 6a–7a. But this is a distinction without a difference, because neither Section 16(b) nor Rule 23 confers the right to prosecute someone else's claim—

much less those of an entire class. Indeed, in that respect, the congruence between the two forms of action is a close one. Congress expressly rejected such representative FLSA actions in 1947.[4] Similarly, as described above, the Rules Enabling Act bars such an application of Rule 23.

Were there any doubt regarding that result, it should be put to rest by the application of Rule 23's requirements that putative class representatives possess claims "typical of the claims...of the class" and be positioned so as to "fairly and adequately protect the interests of the class." Fed. R. Civ. P 23(a)(3), (4). In recognition of the interests and rights of class members who may find themselves bound by a judgment or settlement, "[a] class representative must be part of the class and possess the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U. S. 395, 403 (1977) (quotation

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[4] The substantive rights contained in the FLSA's Section 16(b) do not include the right to representative actions. In 1947, Congress amended Section 16(b) in the Portal-to-Portal Act. Pub. L. No. 80-49, § 5, 61 Stat. 84, 87–88 (1947). These amendments added the opt-in requirement and repealed a provision in Section 16(b) "permitting an employee or employees to designate an agent or representative to maintain an action for and in behalf of all employees similarly situated." H.R. Rep. No. 80-326, at 13 (1947). These changes had "the purpose of limiting private FLSA plaintiffs to employees who asserted claims *in their own right* and freeing employers of the burden of representative actions." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989) (emphasis added).

marks omitted). But a named plaintiff whose claims have already been satisfied stands in a very different position than putative class members, having no incentive to maximize compensation to the class. A named plaintiff whose own claim has been mooted is therefore not appropriately "typical" and cannot be presumed to be an adequate class representative. *See Amchem*, 521 U.S. at 625–26. To the contrary, "[s]uch a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Hansberry v. Lee*, 311 U.S. 32, 45 (1940). Rule 23, of course, must be interpreted and applied consistent with the constitutional imperative of due process to forbid that result.

Thus, Rule 23 and Section 16(b) of the FLSA both permit mass joinder of similarly situated claims—but only when all plaintiffs have viable claims. Neither, however, allows a named plaintiff whose claim has been mooted to stand in for other class members who may or may not be injured. Stated differently, there is no substantive right to a class procedure under either Rule 23 or the FLSA. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980) ("the right to represent a class" is "a procedural claim"); 5-23 Moore's Federal Practice–Civil § 23.02 ("The class-action suit is a procedural device for joining parties. It permits single-action litigation of multiple claims involving similar or identical questions

of fact and law that arise from a common set of operative facts.").

In sum, class litigation is not an end in itself. "It is simply a device to vindicate the rights of individual class members." *Sykes v. Mel S. Harris and Associates LLC*, 780 F.3d 70, 102 (2d Cir. 2015). Straightforward application of that principle controls the result here.

C. The Contrary Conclusion of the Dissent in *Genesis Healthcare* Has Led Lower Courts Astray

The dissenting opinion in *Genesis Healthcare* loses sight of that principle, concluding that representative parties (at least under Section 16(b) of the FLSA) do have a right to assert others' claims. In particular, it asserts that "a judgment satisfying an individual claim does not give a plaintiff like Smith, *exercising her right to sue on behalf of other employees*, 'all that [she] has...requested in the complaint (i.e., relief for the class).'" *Genesis*, 133 S. Ct. at 1536, (Kagan, J., dissenting) (quoting *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 341 (1980) (Rehnquist, J., concurring)) (emphasis added). It is the plaintiff's choice, the opinion continues, "and not the defendant's or the court's, whether satisfaction of her individual claim, without redress of her viable classwide allegations, is sufficient to bring the lawsuit to an end." *Id.*

Not only is this view indefensible with respect to FLSA collective actions—the dissenting opinion

simply asserts this result, without any support or reasoning—but it has even less currency with respect to class actions under Rule 23. It could at least be argued that, under the FLSA, Congress might have intended to give plaintiffs a right to proceed collectively. *See id.* (quoting *Hoffmann–La Roche*, 493 U.S. at 170). But no such argument can be made under the Rules Enabling Act, which expressly rejects any such contention. *See supra* § I.A.

That has not, however, prevented lower courts from following the approach of the *Genesis Healthcare* dissent to hold that unaccepted Rule 68 offers of judgment do not render a named plaintiff's class claims moot. *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 954–55 (9th Cir. 2013); *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 704 (11th Cir. 2014) (relying substantially on *Genesis* dissent to hold that "[e]ven if the individual claims are somehow deemed moot, the class claims remain live, and the named plaintiffs retain the ability to pursue them."); *Boucher v. Rioux*, No. 14-CV-141-LM, 2014 WL 4417914, at *3 (D.N.H. Sept. 8, 2014) ("Post-*Genesis* jurisprudence in both the circuit courts and the district courts has taken a favorable view of Justice Kagan's dissent."); *Yaakov v. ACT, Inc.*, 987 F Supp. 2d 124, 128 (D. Mass. 2013) (relying on *Genesis* dissent to hold that a plaintiff seeking to represent a class should be permitted to accept an offer of judgment on her individual claims under Rule 68, receive her requested individual relief, and have the case dismissed, or reject the offer and pro-

ceed with the class action."); *Sandusky Wellness Ctr. LLC v. Medtox Scientific*, Inc., No. CIV 12-2066 DSD/SER, 2013 WL 3771397, at *2 (D. Minn. July 18, 2013) ("To moot the claim of a putative class representative, a Rule 68 offer must provide complete relief for both the individual and class claims."); *Delgado v. Castellino Corp.*, 66 F. Supp. 3d 1340, 1344 (D. Colo. 2014) ("Moreover, the Court finds certain aspects of Justice Kagan's dissent in *Genesis* persuasive. An Offer of Judgment that addresses only the relief attainable by an FLSA plaintiff in an individual capacity does not grant that plaintiff all of the relief that the FLSA permits, such that dismissal on mootness grounds is appropriate."); *Collado v. J. & G. Transp., Inc.*, No. 14-80467-CIV, 2014 WL 6896146, at *2 (S.D. Fla. Dec. 5, 2014) ("Essentially, Rule 23 provides a unique procedural tool granting a named plaintiff the right to act as a 'private attorney general' to vindicate the rights of a broader class of yet-unnamed plaintiffs.").

By adopting the *Genesis Healthcare* dissent's rationale, these and other courts have run roughshod over the limitations of both the Rules Enabling Act and Rule 23 itself. Their error in confusing procedural mechanisms for substantive rights requires correction.

D. Recognition of a Right To Pursue Class Claims Would Undermine Congress's Careful Delineation of Individual Remedies

Correction of lower courts' errant decisions recognizing a right to pursue class claims is necessary to carry out congressional policy in an additional respect, beyond enforcing the Rules Enabling Act.

When courts give substantive impact to the procedural mechanisms of Rule 23 (or FLSA Section 16(b)), they warp the individual rights contained in the underlying substantive laws. Substantive laws that provide private remedies are typically designed to be enforced on an individual basis. Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal. F. 71, 75 (2003) (substantive remedial laws "are designed to make the private victim whole by obtaining compensation" from the wrongdoer). Allowing freestanding class claims, divorced from any individual injury, transforms those limited damages remedies into offensive weapons that defendants are powerless to settle according to the statutory terms. In effect, the claimed right to pursue class claims becomes a right to extort high-value settlements, far in excess of anything that Congress intended.

To the contrary, as with many remedial schemes, Congress anticipated that the Telephone Consumer Protection Act would be enforced primarily on an individual basis, with a low-value statutory damages

claim to remedy the commensurately minor injury of unwanted communications. The statute provides for a maximum recovery of $500 for each violation as well as treble damages if the plaintiff can prove willful or knowing violation. 47 U.S.C. § 227(b)(3). "This most likely exceeds any actual monetary loss...suffered by most plaintiffs in such a case." *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 404 (E.D. Pa. 1995).

The TCPA's supporters in Congress anticipated that individual actions would be the prevailing means of enforcement: "[I]t is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court.... However it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than potential damages." 137 Cong. Rec. 30821–22 (1991) (Statement of Sen. Hollings) (explaining the private right of action provision). The statutory remedy is designed to provide adequate incentive for an individual plaintiff to bring suit on her own behalf.

Yet cases like this one have precious little to do with the individuals for whom Congress sought to provide relief. Instead, class litigation is typically a choice made by class counsel. "[A]s a practical matter, it is the private attorneys who initiate suit and who are the only ones rewarded for exposing the defendants' law violations." Redish, 2003 U. Chi. Legal. F. at 75. And when there is not even a single plaintiff with a live personal claim, the attorneys answer

to no one but themselves, seeking windfalls where Congress provided for modest compensation. *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 882–83 (1987) (discussing opportunistic conduct by class counsel).

The requirement of an actual, live controversy is not a perfect check on potential abuses of the class-action mechanism, but it serves at least to address suits lacking any real controversy other than the amount of attorneys' fees to be paid.

II. The "Relation-Back" Doctrine Is Inapplicable When the Named Plaintiffs' Claim Is Mooted by an Offer of Complete Relief

The judicially-created "relation-back" doctrine is inapplicable here, with respect to offers of complete relief to Rule 23 named plaintiffs, for the same reasons that the Court held it to be inapplicable to FLSA plaintiffs in *Genesis Healthcare*. *See* 133 S. Ct. at 1530–31.

Sosna v. Iowa, 419 U.S. 393 (1975), stands for the proposition that, where a legal controversy would otherwise evade review due to its transient nature, "a class action is not rendered moot when the named plaintiff's individual claim becomes moot after the class has been duly certified." *Genesis Healthcare*, 133 S. Ct. at 1530. That case, for example, involved a challenge to an Iowa statute requiring one year's in-

state residency prior to filing a petition for divorce, such that any individual claim would surely be mooted during the course of litigation. 419 at 395–96. In *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 336–37 (1980) and *United States Patrol Commission v. Geraghty*, 445 U.S. 388, 404 & n.11 (1980), the Court narrowly extended *Sosna's* rule to situations where class certification had been *adjudicated* prior to the mooting of the representative's claim.

Sosna, however, took pains to note the self-limiting character of its rule: "the same exigency that justifies this doctrine serves to identify its limits. In cases in which the alleged harm would not dissipate during the normal time required for resolution of the controversy, the general principles of Art. III jurisdiction require that the plaintiff's personal stake in the litigation continue throughout the entirety of the litigation." 419 U.S. at 402. And subsequent cases maintained that limitation. *E.g.*, *Geraghty*, 445 U.S. at 398.

The present case neither satisfies the rule nor implicates the underlying policy concerns of *Sosna* and its progeny. The plaintiff's claim became moot before the district court made any ruling on certification. Pet. App. 5a. Thus, as in *Genesis Healthcare*, relation-back is categorically unavailable "because the Court explicitly limited its holding to cases in which the named plaintiff's claim remains live at the time the district court denies class certification." 133 S. Ct. at 1530.

There is no cause to depart from that bright-line rule because settlement offers do not implicate the the "inherently transitory" rationale that has justified application of the relation-back doctrine. That "rationale was developed to address circumstances in which the challenged conduct was effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course." *Id.* at 1351. But, just as the Court observed in *Genesis Healthcare*, "this doctrine has invariably focused on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy," *id.*, and the defendant's action to provide the named plaintiff with complete relief is the only basis for mootness here. And unlike the injunctive-relief claim in *Sosna*, the claims here will not become moot on their own, merely through passage of time. Accordingly, relation-back is no more applicable to a class action mooted by an offer of complete relief than to an FLSA collective action.

Finally, there is no basis to give any weight to the discredited dicta from *Roper* that application of relation-back may be appropriate to prevent defendants from using settlements to "pick off" named plaintiffs before the class action has run its course. 445 U.S. at 339. To begin with, the Court has repudiated the legal significance of that portion of *Roper*, recognizing that it is only dicta. *Genesis Healthcare*, 133 S. Ct. at 1532. *Roper* is also distinguishable on its unusual facts, given that the plaintiff here (unlike the one in *Roper*) does not "assert any continuing economic in-

terest in shifting attorney's fees and costs to others." *Id.*

All that to the side, *Roper's* concern would be misplaced here. In this case, thousands of consumers are alleged to have received phone messages in violation of the TCPA, and any one of these individuals (if they actually exist, which is not reflected in the record) could bring a class action. And any one of them could file an individual claim and receive statutory damages likely far in excess of any actual damages they may have accrued—also likely far in excess of what they would receive in a class-action settlement. In the event that enough plaintiffs turn up, the defendant may come to prefer class certification, so as to put the claims against it to rest through a class-wide settlement. Unless and until that comes to pass, however, "picking off" plaintiffs by offering complete satisfaction of their asserted claims would most likely be to their and the defendant's mutual benefit.

In sum, there is no reason to expand the reach of the relation-back doctrine to reach class claims mooted by an offer of complete relief to the named plaintiff.

III. Recognizing a Right To Pursue Class Claims Would Raise Serious Constitutional Concerns Under Article III

The second question presented in this case—concerning the asserted ability of named plaintiffs, whose own claims have been found moot, to pursue claims belonging to other persons—raises essentially the same constitutional concerns as the respondent's claim to standing without factual injury in *Spokeo, Inc. v. Robins*, No. 13-1339. If the sole named plaintiff's claim becomes moot prior to class certification, the matter is no longer a proper "case" or "controversy" suitable for adjudication by an Article III court because the named plaintiff no longer possesses an unremedied injury in fact, irrespective of whether she might ultimately obtain an incentive payment—analogous to the statutory-damages remedy at issue in *Spokeo*.

In the main, mootness is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997). This is, no less than standing, "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). *See also Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 190–91 (2000) (courts may not "retain jurisdiction over cases in which one or both of the parties plainly lack a con-

tinuing interest"). The "irreducible constitutional minimum" for a justiciable dispute is an "injury in fact" caused by the conduct complained of and likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 560.

That requisite interest, however, "must consist of obtaining compensation *for*...the violation of a legally protected right." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) (emphasis added). And that is what is lacking here, where the named plaintiff's right of compensation relating to her own injury has already been satisfied. "An interest unrelated to injury in fact is insufficient to give a plaintiff standing," *id.*, and therefore insufficient to overcome mootness. Accordingly, a named plaintiff whose own claim has been mooted stands in no better position than a plaintiff who has suffered no actual injury in fact.

Indeed, such a plaintiff has even less of a claim for Article III adjudication, because she lacks any cognizable remedy. While the named plaintiff might or might not receive an incentive award if the class is certified and settled, "the same might be said of someone who has placed a wager upon the outcome." *Id.* Such an interest is, at best, "merely a 'byproduct' of the suit itself," and therefore cannot support exercise of Article III power. *Id.* at 773.

These are, it must be remembered, structural limitations on the exercise of judicial authority. And it "is settled that Congress cannot erase Article III's standing requirements by statutorily granting the

right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). Thus, when the sole named plaintiff's claim becomes moot, adjudication of the action is outside the power of Article III courts, and no rule, statute, or judge-made doctrine may alter that result.

"In an era of frequent litigation [and] class actions...courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Wynn*, 131 S. Ct. 1436, 1449 (2011). The same holds true for the related doctrine of mootness. "Headless" class actions like this one, bereft of any interested plaintiff and therefore driven entirely by class counsel, raise an acute "risk of 'in terrorem' settlements." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). Strict adherence to the requirements of Article III helps to ensure that class actions are contained to their proper role of addressing common injuries and do not become an offensive weapon to extract windfall attorney's fees with little or no connection to the injuries for which Congress sought to provide redress.

CONCLUSION

The judgment of the court of appeals should be reversed.

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Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Defense Industrial Association ("NDIA") is a non-partisan and non-profit organization comprised of more than 1,600 corporations and nearly 90,000 individuals spanning the entire spectrum of the defense industry. NDIA's contractor members provide a wide variety of goods and services that are essential to U.S. national security strategy and military operations. These include, for example, supplying military hardware, providing logistical services for troop support, training foreign military forces, and performing cybersecurity services to protect the nation's vital public and private information. The Department of Defense ("DOD") and other federal agencies responsible for the national defense harness this private-sector innovation for public-sector needs.

NDIA's members thus have a vital interest in the resolution of the Petitioner's third question presented: "Whether the doctrine of derivative sovereign immunity recognized in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), for

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[1] Pursuant to U.S. Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no such counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.3(a), and as noted on the case docket by the Clerk, all parties previously have filed letters granting blanket consent to the filing of *amicus curiae* briefs in support of either or of neither party.

government contractors is restricted to claims arising out of property damage caused by public works projects." The NDIA is uniquely qualified to explain why the Ninth Circuit's answer to this question is incorrect. Further, it is especially well positioned to explain the adverse private and public impacts of the Ninth Circuit's overly-narrow construction of *Yearsley*. In addition, NDIA is particularly familiar with the realities of modern federal procurement policy and the corresponding need to update the principles of derivative sovereign immunity as it applies to government contractors.

INTRODUCTION AND SUMMARY OF ARGUMENT

Derivative sovereign immunity reduces to a simple proposition: if the federal government enjoys sovereign immunity from tort suits for its own actions, should not an individual or company performing those same actions at the request or direction of the federal government also have similar protection from liability? *See Yearsley*, 309 U.S. 18 at 21. Over the past century, this Court has applied the doctrine of derivative sovereign immunity, in one form or another, to government employees, private citizens, and contractors performing work on behalf of the government.

Now, more than ever before, the federal government uses private contractors to provide essential goods and services that the government itself lacks the organic capability to produce or perform. Extending derivative sovereign immunity to private contractors serves two important purposes.

First, it protects the government's own sovereign immunity, because otherwise private contractors incurring liabilities during contract performance would pass along those costs to the government, either directly or indirectly. Second, it ensures that private contractors remain willing to perform essential tasks when asked by the government, rather than declining to do so for fear of being held liable to a third party for doing the government's work.

This Court recognized these federal interests in *Yearsley* as well as in subsequent decisions. *See Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988) (using *Yearsley* and the discretionary function exception of the Federal Tort Claims Act as foundations for the government contractor preemption defense); *Filarsky v. Delia*, 132 S. Ct. 1657, 1658 (2012) (recognizing deleterious effect if private individuals were held personally liable for work performed at the behest of the government).

Yearsley and its progeny construe derivative sovereign immunity broadly, in keeping with the same bedrock principles as sovereign immunity itself. By contrast, the Ninth Circuit's decision in this case, limiting *Yearsley* to public works contracts, would narrow derivative sovereign immunity to near-irrelevance and run counter to the underlying federal interests. Accordingly, for the reasons set forth by Petitioner and the other amici curiae, NDIA supports Petitioner's request for reversal.

NDIA further submits that this case presents an opportunity not only to address the proper

application of *Yearsley*, but also the closely-related government contractor preemption defense set forth in *Boyle* in 1988. Although the three-part *Boyle* test has adequately addressed product defect tort cases, this case provides an opportunity for the court to harmonize the principles in *Boyle* and *Yearsley*, as well as to update this area of the law to reflect the realities of modern procurement practice. The Court should take this opportunity to update and upgrade the test to reflect the changes in the government's procurement methods and to resolve some of the inconsistencies that lower courts have created when applying *Yearsley* and *Boyle*.

Specifically, the NDIA urges this Court to fashion a unifying modernized test that extends the protection of derivative sovereign immunity to contractors where: (1) the government exercised its judgment or discretion during the contracting process; (2) the government accepted the contractor's work with knowledge of any risks or dangers known to the contractor; and (3) the third-party plaintiff now seeks to hold the contractor liable for actions taken within the scope of its contract. This revised test remains true to the principles of *Yearsley* and *Boyle*, is better suited to the government's modern acquisition system, and sets appropriate limits for the protection provided to private contractors.

ARGUMENT

I. Derivative Sovereign Immunity Is Solidly Rooted In American Jurisprudence And Applies To Contractors.

The doctrines of sovereign immunity and derivative sovereign immunity have deep roots in American jurisprudence. This Court long has held that a sovereign government is immune from claims unless it has waived immunity and consented to suit. *See, e.g.*, *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *United States v. Mitchell*, 445 U.S. 535, 538 (1980). For nearly as long, the courts have applied derivative sovereign immunity, in one form or another, to government employees, private citizens, and contractors performing work on the government's behalf. *See Filarsky*, 132 S. Ct. at 1658 (describing such protection as anchored in a common law tradition that predates 1871); *Yearsley*, 309 U.S. at 21-22. In each instance, the courts have relied upon similar considerations in extending the government's sovereign immunity to those working on behalf of the government-not only to protect private actors, but also and more importantly to protect the government's interests. In the absence of congressional action, courts have exercised their inherent powers to shape the parameters of these principles. *Howard v. Lyons,* 360 U.S. 593, 596-97 (1959).

A. A Form Of Derivative Sovereign Immunity For Federal Employees

The common law's extension of the sovereign's immunity to federal employees has storied roots. In

Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), Judge Learned Hand described the need to protect federal officials acting on behalf of the government in order to protect the government itself:

> [T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties [I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

Id. at 581.

This Court has adopted and expanded upon Judge Hand's thinking. In *Barr v. Matteo*, 360 U.S. 564, 568-69 (1959), the Court extended immunity to federal employees who act within their "line[s] of duty." Then, in *Westfall v. Erwin*, 484 U.S. 292 (1988), the Court held that when the sovereign delegates functions to federal employees exercising discretionary decisionmaking on its behalf, those employees are entitled to the same protections afforded the sovereign with respect to those functions. This entitlement—

> is not to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation. The provision of immunity

> rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits.

See id. at 295.

B. A Form Of Derivative Sovereign Immunity For Private Citizens Working For The Government

This Court has similarly applied a form of derivative sovereign immunity to private citizens contracted to perform government functions and who acted within their delegated duties. In *Filarsky*, the Court applied derivative sovereign immunity principles to claims against a private attorney retained by the government as a contractor to carry out a government investigatory function. The Court found that private individuals performing government functions should not be left "holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *Filarsky*, 132 S. Ct. at 1666.

In reaching this conclusion, the Court recounted the history of private citizens receiving derivative sovereign immunity and noted that, even in the mid-nineteenth century, "the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out

government responsibilities." *Id.* at 1663. Indeed, "examples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself." *Id.* at 1665. Protection from third-party lawsuits is needed to avoid "'unwarranted timidity'" by those doing the public's business, and to ensure that "talented individuals" with "specialized knowledge or expertise" are willing to accept public engagements. *Id.* at 1665-66.

C. A Form Of Derivative Sovereign Immunity For Contractors Working For The Government

In *Yearsley*, this Court similarly applied derivative sovereign immunity to a private contractor performing duties delegated by the government. Essentially, *Yearsley* did for private companies what *Gregoire*, *Barr*, *Westfall*, and *Filarsky* did for government employees and private citizens. The Court later expounded on *Yearsley* in *Boyle* and enunciated the closely-related government contractor preemption defense. Since then, however, lower courts have confused and conflated derivative sovereign immunity and the government contractor preemption defense, resulting in a tangled web of cases in which contractors are sometimes denied the protection intended by *Yearsley* and its progeny.

1. Derivative Sovereign Immunity Under Yearsley And Its Direct Progeny

In *Yearsley*, the plaintiffs claimed that a contractor damaged their property while providing

dredging services on the Missouri River under a contract with the U.S. Army Corps of Engineers, and sought damages under a takings theory. *See* 309 U.S. at 19-21. This Court held that a contractor that works on behalf of the government, within the scope of authority "validly conferred," is not liable for such a loss. *Id.* at 21-22. Rather, the contractor's acts were "act[s] of the government" and thus—unless the government waived its immunity—protected from suit. *Id.* at 22.

Despite the scant precedent at the time, the *Yearsley* Court did not create a new immunity doctrine for contractors from whole cloth. *See* Brief for United States as Amicus Curiae Supporting Respondent, *Yearsley v. W.A. Ross Constr. Co.*, No. 156, 1939 WL 48388, at *21 (1939) ("[T]he paucity of cases directly so holding appears to be attributable to the clarity of the proposition and to the limited number of situations which could give rise to such cases."). Indeed, state courts regularly disposed of suits that alleged takings and torts claims against contractors on public works projects. *See id.* at *32-34. For instance, the Supreme Court of Tennessee assessed a contractor's liability for tort claims arising out of its construction of a dam by looking to the potential liability of the federal government. *See Chattanooga & Tenn. River Power Co. v. Lawson*, 201 S.W. 165, 169 (Tenn. 1918). Similarly, the Supreme Court of Louisiana dismissed a tort suit alleging that a contractor's road work affected the plaintiff's property. *See Connell v. Yazoo & M.V.R. Co.*, 75 So. 652, 655 (La. 1917). And in New York, a plaintiff could not prevail on a takings claim against a contractor based on a dam project; the court

limited the plaintiff's remedies to those set by the statute that authorized the project. *See W. Calking v. S.W. Baldwin*, 4 Wend. 667, 672 (N.Y. Sup. Ct. 1830).

Since *Yearsley*, some lower courts have followed this straightforward application of derivative sovereign immunity to contractors. These courts recognize that a contractor is protected from third-party claims when it has acted pursuant to authority validly conferred by the government and within the scope of its contract. *Yearsley*, 309 U.S. at 20-21. For example, in *Butters v. Vance International, Inc.*, 225 F.3d 462 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit addressed *Yearsley* and stated:

> This public interest remains intact when the government delegates that function down the chain of command. As a result, courts define the scope of sovereign immunity by the nature of the function being performed—not by the office or the position of the particular employee involved. *Imposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work.* As a result, courts have extended derivative immunity to private contractors, "particularly in light of the government's unquestioned need to delegate government functions."

225 F.3d at 466 (emphasis added) (quoting *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1448 (4th Cir. 1996)).

As another example, in *Mangold v. Analytic Services, Inc.*, 77 F.3d at 1445, an Air Force officer and his wife sued a government contractor, alleging it defamed them and inflicted emotional distress by voluntarily cooperating with a government investigation into the officer's activities. As it later did in *Butters*, the Fourth Circuit found that "[e]xtending immunity to private contractors to protect an important government interest is not novel," and that, "no matter how many times or to what level [a government] function is delegated, it is a small step to protect that function when delegated to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions."[2] *Id.* at 1447-48; *see also Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67 (2d Cir. 1998) (dismissing tort action against private insurance carrier acting on behalf of United States).

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[2] Similarly, the conduct of individuals and private entities with whom the government contracts has been attributed to the government in other contexts. *See, e.g., Burton v. Wilmington Parking Authority*, 365 U.S. 715, 724-25 (1961) (prohibiting racial discrimination by restaurant "operated as an integral part of a public building" and with which the state government had "insinuated itself into a position of interdependence"); *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219, 1222, 1226-27 (5th Cir. 1982) (characterizing contractor conduct as "state action" because of the close, symbiotic relationship between the contractor and the government).

Unfortunately, courts have struggled to define the parameters of derivative sovereign immunity as applied to contractors, particularly in light of the Court's *Boyle* decision. This confusion has eroded the protection intended by *Yearsley* and its progeny.

2. Lower Courts Have Erroneously Construed The Government Contractor Preemption Defense To Narrow *Yearsley* And Derivative Sovereign Immunity.

Much of the confusion surrounding derivative sovereign immunity for contractors traces back to *Boyle* and the cases that have applied it. In *Boyle*, the estate of a Marine who had been killed in a helicopter crash sued the manufacturer of the military helicopter. *See* 487 U.S. at 500. The estate alleged that the manufacturer had negligently designed the helicopter's escape hatch, and a jury found against the manufacturer. *See id.* On appeal, the Fourth Circuit reversed and remanded. *See id.* Applying what it characterized as the "military contractor defense"—now commonly known as the "government contractor defense"—the Fourth Circuit concluded that federal common law preempted the defective design claims asserted against the manufacturer.

This Court agreed with the result reached by the Fourth Circuit, but not its analytical framework. The Court first recognized that the lawsuit's subject matter touched upon not one but two areas of uniquely federal interest—"obligations to and rights of the United States under its contracts," and "the

civil liability of federal officials for actions taken in the course of their duty." *Id.* at 505-06. Building upon its prior decision in *Yearsley*, the Court concluded that "the reasons for considering these closely related areas to be of 'uniquely federal' interest apply as well to the civil liabilities arising out of the performance of federal procurement contracts." *Id.*

The Court did not simply follow *Yearsley*, however, when it examined under what circumstances state tort law would conflict with these uniquely federal interests. *See Boyle*, 487 U.S. at 511. Further, although *Boyle* cites *Westfall*, which the Court had decided earlier that same term, the Court in *Boyle* did not use *Westfall* as the underlying rationale for the *Boyle* test. Instead, the Court created a more specific framework for analysis by applying the discretionary function exception contained within the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a).

Specifically, the Court recognized that the government's selection of an appropriate design for military equipment was a discretionary function, involving "not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations." *Boyle*, 487 U.S. at 511. That judgment should not be subject to judicial "second-guessing," even when, as contemplated by the FTCA, "the discretion involved be abused." *Id.* The FTCA's discretionary function exception shields the government against potential tort liability for such decisions. *See id.* at 528-29.

The Court concluded that permitting state tort suits against contractors under such circumstances would negate the purpose of the discretionary function exception, because the financial burden of judgments against contractors would be passed along to the government. *See id.* at 531. In other words, it "makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." *Id.* at 512.

To resolve the specific allegations and circumstances of *Boyle*, the Court applied a three-part test to determine whether the claims alleged against the contractor were preempted: First, did the government approve reasonably precise specifications for the design? Second, did the equipment conform to those specifications? Third, did the contractor warn the government about the dangers of using the equipment that were known to the contractor but not to the United States? *See id.* The first two factors ensured that "the suit [was] within the area where the policy of the 'discretionary function' would be frustrated," while the third ensured that no incentive existed for a contractor to withhold information regarding risks of which it had actual knowledge. *Id.* at 512-13.

Since *Boyle*, some courts have used the *Yearsley* and *Boyle* tests interchangeably. For example, in *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326 (4th Cir. 2014), the plaintiffs brought tort claims against a logistical support provider that was

operating under a contract to perform waste disposal for the U.S. military in Iraq and Afghanistan. The Fourth Circuit examined whether the defendant was entitled to assert *Yearsley* derivative sovereign immunity. The court began with the proper inquiry under *Yearsley*-whether the contractor was acting within its authority under a valid contract or had exceeded "the scope of its employment." *Id.* at 343 (citing *Butters*, 225 F.3d at 466). But then the court took a wrong turn by borrowing the second prong from *Boyle*-whether the contractor complied with the government's precise "instructions"-and grafting that onto the *Yearsley* test. *See id.* at 345. Neither *Yearsley* nor any of its progeny endorsed this hybrid approach.

The Sixth Circuit recently expressed similar confusion in *Adkisson v. Jacobs Engineering Group*, No. 14-6207, __ F.3d ___, 2015 WL 3463032, at *4 (6th Cir. June 2, 2015). In *Adkisson*, the Sixth Circuit considered whether an engineering company engaged by the Tennessee Valley Authority to provide remediation work could assert derivative sovereign immunity as a defense to third-party personal injury claims. Citing *Yearsley* and *Boyle*, the court stated: "If *Yearsley* really does stretch as broadly as its language suggests, the Supreme Court in *Boyle* would presumably not have invented a new test to govern the liability of military procurement contractors; it could have simply cited *Yearsley* and called it a day." *Id.* at *4. Because the plaintiffs in *Adkisson* conceded *Yearsley*'s applicability, however,

the Sixth Circuit did not have to reach these "thorny questions." *Id.*[3]

The confusion about *Yearsley*, *Boyle*, and their relationship with one another has been compounded by the transformation of federal contracting over the past three decades. Set against the realities of the modern acquisition system, courts struggle to differentiate between and apply *Yearsley* and *Boyle*.

II. Modern Acquisition Practice Renders the Foundational Case Law Outdated And In Need Of Refinement.

Government procurement has metamorphosed in the nearly thirty years since *Boyle*. The modern era is characterized by three trends in particular: (A) an increasing reliance on contractors to perform a larger and more diverse variety of functions, especially services; (B) the use of "umbrella" contracts of indefinite duration and performance requirements that maximize contractor flexibility and efficiency; and (C) a preference for performance-

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[3] The Sixth Circuit ultimately concluded that derivative sovereign immunity was an affirmative defense and remanded the case for the district court to consider whether the contractor was eligible for *Yearsley* immunity and determine whether the contractor's conduct was of the type that the FTCA's discretionary function exception was designed to shield. *Adkisson*, 2015 WL 3463032 at *7. The defendant has expressed its intention to file a petition for certiorari, and the Sixth Circuit has stayed issuance of the mandate pending resolution of that petition. *See* Order to Stay Mandate, *Adkisson v. Jacobs Engineering*, No. 14-6207 (6th Cir. Jul. 15, 2015).

based acquisitions over specification-based contracts. As the government delegates more and more responsibility to its contractors, the need continues to grow for the Court to clarify *Yearsley* derivative sovereign immunity and update the *Boyle* government contractor preemption defense.

A. Services Contracts

More than ever before, the government relies on private contractors to provide all manner of goods and services. In fiscal year 2014, the government spent $447.6 billion on contracts.[4] Services contracts, in particular, have been on the rise,[5] and contractors now frequently provide mission-critical services that, in the *Boyle* era, would have been performed by government personnel.[6]

DOD has led the way in its reliance on contractor-provided services, more than doubling its services-acquisition spending between fiscal years

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[4] *See* Bloomberg Government, BGOV200 Federal Industry Leaders 2015 (June 8, 2015), *available at* http://about.bgov.com/nextedge/report/bgov-200/.

[5] *See* Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress at 2-3 (Jan. 2007) ("AAP Report"), *available at* http://www.ndia.org/Advocacy/AcquisitionReformInitiative/Documents/4-24102_GSA.pdf.

[6] *See* U.S. Gov't Accountability Office, GAO-08-160, Federal Acquisition: Oversight Plan Needed to Help Implement Acquisition Advisory Panel Recommendations 1, 15 (2007), *available at* http://www.gao.gov/assets/280/270729.pdf.

2000 and 2012.[7] Contractors support nearly every aspect of DOD's mission and have been vital to military operations in Iraq and Afghanistan,[8] comprising 50 percent or more of the total military force in those theaters.[9]

DOD now engages contractors to provide a range of services that it insourced to enlisted personnel in the past.[10] Contractors perform intelligence analysis, security services, and engineering and technical support, as well as critical logistical support such as custodial, dining, and laundry services.[11] For example, through its Logistics Civil Augmentation Program—known as "LOGCAP"—the Army has depended on private

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[7] U.S. Gov't Accountability Office, GAO-13-634, Defense Acquisitions: Goals and Associated Metrics Needed to Assess Progress in Improving Service Acquisition 1 (2013) (after adjustment for inflation), *available at* http://www.gao.gov/assets/660/655605.pdf.

[8] *See id.*; Moshe Schwartz & Jennifer Church, Cong. Research Serv., R43074, *Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress*, at 1-4 (2013).

[9] *See* Schwartz & Church (Summary).

[10] *See* Defense Science Board Task Force, Improvements to Services Contracting 31 (Mar. 2011), *available at* http://www.acq.osd.mil/dsb/reports/ADA550491.pdf.

[11] *See* U.S. Gov't Accountability Office, GAO-08-621T, Defense Acquisitions: DOD's Increased Reliance on Service Contractors Exacerbates Long-Standing Challenges 1, 3 (Apr. 3, 2008) (Statement of David M. Walker, Comptroller General of the United States, in Testimony Before the House Subcomm. on Def., Comm. on Appropriations), *available at* http://www.gao.gov/assets/120/119530.pdf.

contractors "to provide full-spectrum logistics and base support services" around the world for the past three decades.[12] Between 2001 and 2009, the LOGCAP III contract in Iraq and Afghanistan totaled more than $36 billion of work.[13]

It is not only DOD that now relies on contractors for mission-critical services. Following the military's withdrawal from Iraq, the State Department has used contractors to train Iraqi police, detect enemy rockets and roadside bombs, operate reconnaissance drones, pilot helicopters, and serve as first-responders for civilians.[14] The U.S. Agency for International Development ("USAID") also depends on contractors for its development projects worldwide, including in high-risk and war-torn areas. Between fiscal years 2002 and 2013, for example, the State Department and USAID together spent approximately $26 billion on contracts to be performed in Iraq and Afghanistan.[15]

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[12] *Logistics Civil Augmentation Program*, Army Reg. 700-137, § 3-3(a) (Dec. 28, 2012).

[13] *See* Doug Brooks & Fiona Mangan, *Modern Use of Contractors in Peace & Stability Operations*, 18 Brown J. World Aff. 181, 184 (2011).

[14] *See* Michael R. Gordon, *Civilians to Take U.S. Lead as Military Leaves Iraq*, N.Y. Times, Aug. 19, 2010, at A1.

[15] U.S. Gov't Accountability Office, GAO-14-229, Contingency Contracting: State and USAID Made Progress Assessing and Implementing Changes, but Further Actions Needed 1 (2014), *available at* http://www.gao.gov/assets/670/660956.pdf.

B. Umbrella Contracts

In conjunction with its increasing use of contractors, the government has fostered flexibility and efficiency through umbrella "indefinite-delivery, indefinite-quantity" ("IDIQ") contracts,[16] in which contractors provide an unspecified quantity of goods or services—subject to stated minima and maxima—during a set timeframe. 48 C.F.R. § 16.504(a). IDIQ procurements require contractors to serve as flexible partners with their government customers, adjusting to changing and unpredictable needs. In fact, the utility of IDIQ contracts is precisely their lack of rigid requirements and specifications.[17]

C. Performance-Based Acquisitions

Finally, "performance-based acquisition" ("PBA") has emerged as a new, preferred acquisition method, "structured around the results to be achieved as opposed to the manner by which the work is to be performed." 48 C.F.R. § 2.101. PBA heralds a conscious redirection away from traditional services-acquisition methods.[18] Of course, in many procurements, particularly major weapon systems, the government continues to exercise ongoing and detailed control through constant review and

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[16] AAP Report at 3, 67.

[17] *See id.* at 67.

[18] U.S. Gov't Accountability Office, GAO-03-281, Acquisition Management: Agencies Can Improve Training on New Initiatives 10 (2003) ("New Initiatives Report"), *available at* http://www.gao.gov/new.items/d03281.pdf.

approval of the contractor's activities. In PBA procurements, by contrast, contractors are evaluated and paid based on their achievement of specified end goals, not their ability to check boxes along the way.[19]

The government's commitment to PBA is strong. The Office of Federal Procurement Policy introduced PBA as the preferred method for services acquisitions in 1991, and Congress legislatively enacted that preference in 2000. *See* National Defense Authorization Act, Pub. L. No. 106-398, 114 Stat. 1654 (2000). The Federal Acquisition Regulation implements this PBA preference and requires agencies to use PBA "methods to the maximum extent practicable." 48 C.F.R. § 37.102(a), (a)(1). Agencies have kept pace with the PBA initiative and significantly increased their use of PBA vehicles, even exceeding goals set by the Office of Management and Budget.[20]

To be clear, the federal government continues to exercise significant judgment and discretion in its procurement activities. But, particularly in the acquisition of services, the new federal procurement paradigm in many instances has replaced detailed specifications with performance-based directions;

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[19] *See* AAP Report at 171.

[20] *See, e.g.*, U.S. Gov't Accountability Office, GAO-14-819, USDA Contracting: Further Actions Needed to Strengthen Oversight of Contracts for Professional Services 12, 22 (Sept. 2014), *available at* http://www/gao/gov/assets/670/666216.pdf; AAP Report at 172–73.

concrete requirements with IDIQ contracts and more generalized statements of work; and arms-length transactions with contracting "partnerships." These new methodologies all maximize the government's contracting flexibility and discretion while taking advantage of contractors' experience and expertise. In short, these modern trends have resulted in a more fluid, less defined procurement process-but one no less defined by the government's exercise of discretion in its procurement decisions.[21]

III. The Court Should Clarify The Parameters Of Derivative Sovereign Immunity Both To Fulfill The Doctrine's Original Purposes And Meet The Realities Of The Modern Acquisition System.

The Ninth Circuit's overly-narrow construction of *Yearsley* presents an opportunity for this Court to resolve the confusion and inconsistencies that have resulted from the lower courts' *ad hoc* approach to derivative sovereign immunity. The Court can weave a unifying principle for the doctrine based on the well-established, well-reasoned threads within the foundational case law. The Court also can clarify the doctrine's relationship with *Boyle's* government contractor preemption defense. Perhaps most importantly, the Court can ensure that the test for derivative sovereign immunity is suited to the government's modern acquisition approach.

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[21] *See* New Initiatives Report at 1.

A. The Broad Policies Underlying The Doctrine Of Derivative Sovereign Immunity Require Rejection Of The Ninth Circuit's Narrow Construction Of *Yearsley*.

In the opinion below, the Ninth Circuit misconstrued this Court's decision in *Yearsley* as "establish[ing] a narrow rule regarding claims arising out of property damage caused by public works projects." Pet. App. 15a. This holding-that *Yearsley* applies only to public works projects-is unsupported by *Yearsley* and its progeny, as well as this Court's similar case law extending immunity to individuals acting on behalf of the government. Indeed, all of the foundational case law in this area shares a common rationale: to protect the government's interests by protecting individuals and contractors who act on the government's behalf. Limiting derivative sovereign immunity to the narrow area of public works projects runs contrary to this purpose.

This Court in *Yearsley* broadly stated that "no liability on the part of the contractor for executing [Congress'] will" can exist if "authority to carry out [the] project was validly conferred." *Yearsley*, 309 U.S. at 20-21. Rather, the contractor's acts are considered "act[s] of the government," at least for the purposes of extending governmental immunity. *Id.* at 22. Although *Yearsley* arose in the context of a service contract for a public works project, nothing in the case suggests that derivative sovereign immunity is limited to such projects. Nor did this Court make that distinction when discussing *Yearsley* in *Boyle*;

the Court broadly referred to the contract in *Yearsley* as a "performance contract," nor simply a public works contract. *See Boyle*, 487 U.S. at 506.

The Fourth Circuit in both *Mangold* and *Butters* applied *Yearsley* outside the sphere of public works projects. In doing so, the court focused on the government's need to contract out certain functions: "no matter how many times or to what level [a government] function is delegated, it is a small step to protect that function when delegated to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions." *Mangold*, 77 F.3d at 1447-48. Further, "[i]mposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work." *Butters*, 225 F.3d at 466. This sound reasoning demands a broad grant of derivative sovereign immunity, not the unduly-restrictive one used by the Ninth Circuit. [22]

A broad grant of derivative sovereign immunity to contractors would also be in line with how this Court has extended immunity to government employees and private individuals. The

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[22] The Ninth Circuit also concluded that *Boyle*'s government contractor preemption defense was "inapposite" because the plaintiff's claim here was based on federal law, not state law. Pet. App. 18a. The Court's decision in *Boyle* suggests otherwise. *See* 487 U.S. at 512 n.5 (describing as "not necessarily correct" the dissent's view that the result would be different if the claim had been based on a federal statute and not state tort law, but leaving that issue for another day).

government has a similar interest in insulating the performance of its functions, whether it delegates that work to a contractor, a government employee, or a private individual. In all such cases, the government needs to ensure that "talented individuals" with "specialized knowledge or expertise" are willing to accept public engagements. *See Filarsky*, 132 S. Ct. at 1665-66. "[E]ffective government will be promoted" if those officials, private individuals, and contractors "are freed of the costs of vexatious and often frivolous damages suits." *Westfall*, 484 U.S. at 295. Contractors and individuals working alongside government employees, who act within the scope of their contract authority to carry out important public functions, should not "be left holding the bag-facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *See Filarsky*, 132 S. Ct. at 1666.

Finally, the modern era of government procurement demands a broad approach to derivative sovereign immunity for a wide range of contracted activities. It makes no sense to immunize a contractor providing civil engineering services for the building of roads, but not software engineering services for the government's technology on the information superhighway. Likewise, there is no reason that a contractor providing security or logistical support services to the government should not have some version of the protection that a federal employee providing the same services would have. The test proposed below provides that protection, while at the same time accounting for the inherent differences between federal employees and for-profit

corporations engaged to perform work subject to extensive federal procurement regulations and requirements and the ultimate oversight of the government.

B. The Court Should Resolve The Confusion Created By Post-*Boyle* Jurisprudence And Clarify The Relationship Between Derivative Sovereign Immunity And The Government Contractor Preemption Defense.

The lower courts' diverging views of *Yearsley* and *Boyle* have created significant uncertainty for government contractors. Further, the fundamental changes in the federal procurement system in the decades since *Boyle*, described *supra*, require a restatement and revision of derivative sovereign immunity and the government contractor preemption defense.

NDIA does not suggest that the Court address and resolve all of the outstanding issues that have arisen since *Yearsley* and *Boyle*. However, the case at hand provides a prime opportunity to articulate a clearer standard for the application of derivative sovereign immunity to federal contractors and set forth a unifying principle to guide lower courts By doing so, the Court will help clarify and resolve:

Whether Boyle Extends to Service Contracts? Some courts have limited *Boyle* to contracts for products and excluded contracts for services. *Compare In re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 811 (9th Cir. 1992) *with Hudgens v. Bell*

Helicopters/Textron, 328 F.3d 1329, 1333-34 (11th Cir. 2003); *Carley v. Wheeled Coach*, 991 F.2d 1117, 1120-21 (3d Cir. 1993). *See also Adkisson*, 2015 WL 3463032, at *4 (noting the "thorny questions" that existed regarding the proper scope of *Boyle's* application in a case involving engineering services). The Court should make clear that *Boyle's* protection extends to both product and service contracts.

Whether Boyle Extends to Civilian Contracts? Despite strong arguments to the contrary, not all courts have concluded that the *Boyle* government contractor preemption defense extends to civilian contracts. *Compare Carley*, 991 F.2d at 1124, *with In re Hawaii Federal Asbestos Cases*, 960 F.2d at 811. The Court should clarify that *Boyle* applies to both military and civilian contracts.

How Does Boyle Apply to Failure to Warn Claims? Boyle did not discuss inadequate warning claims. The circuits are split as to whether a contractor must show merely that the government exercised some discretion over the warnings to be included, or that the government affirmatively prescribed warnings to be given or proscribed additional warnings. *Compare Tate v. Boeing Helicopters*, 55 F.3d 1150, 1152 (6th Cir. 1995), *with Dorse v. Eagle-Picher Industries, Inc.*, 898 F.2d 1487, 1490 (11th Cir. 1990).

What Degree of Government Oversight or Review Is Required to Trigger Boyle? Perhaps most importantly, courts have failed to agree on the degree of government involvement, review, and approval that is necessary to satisfy the first element

of the *Boyle* test. *Compare Stout v. Borg-Warner Corp.*, 933 F.2d 331, 333-34 (5th Cir. 1991) (approval of overall design is sufficient), *with Bailey v. McDonnell Douglass Corp.*, 989 F.2d 794, 799 (5th Cir. 1993) (requiring review and approval of particular design feature at issue).

C. The Court Should Extend Derivative Sovereign Immunity To Government Contractors For Actions Within The Scope Of Their Contracts If The Government Exercised Judgment Or Discretion During The Contracting Process And If It Knowingly Accepted The Contractor's Work.

In addressing the current confusion, the Court should look to two overriding principles set forth in *Yearsley*, *Boyle*, *Filarsky*, and federal jurisprudence generally. First, the government's sovereign immunity must be protected, not only when exercised directly, but also indirectly through the government's use of private contractors to provide goods and services that the government does not, or cannot, obtain from its own resources.

Second, contractors engaged by the federal government to provide their experience and expertise should be protected when they exercise that expertise and judgment in a manner that is acceptable to the government. Otherwise, contractors' fear that they might be left "holding the bag" and liable to third parties for work that the government had deemed acceptable might deter

contractors from providing the goods and services that the government requires.

Keeping these bedrock principles in mind, NDIA suggests that the Court revise and update the test to determine whether a private contractor is protected from liability for the government work it performs. The new test would consist of three elements:

- Did the federal government exercise judgment or discretion through its use of the contractor to provide products or services?

- Did the federal government accept the goods or services provided by the contractor with knowledge of any risks, dangers, or nonconformities of which the contractor had actual knowledge?

- Does the third-party plaintiff seek to hold the contractor liable for work or conduct performed within the scope of the contract?[23]

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[23] The Court may question whether contractors should also have to demonstrate they were acting in a traditional agency capacity on behalf of the government in order to qualify for derivative sovereign immunity. The Fifth Circuit has rejected such a requirement, *see Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 210 (5th Cir. 2009), but courts continue to grapple with the issue. *See, e.g.*, *Adkisson*, 2015 WL 3483032, at *6; *In re KBR, Inc.*, 744 F.3d at 334; *Butters*, 225 F.3d at 466; *Mangold*, 77 F.3d at 1448. NDIA believes that such a showing is not necessary so long as the government has clearly delegated a function in a valid contract.

If all three conditions are satisfied, then the principles of derivative sovereign immunity and preemption as articulated in *Yearsley* and *Boyle* require dismissal of the claims against the contractor.

The proposed test uses a balanced approach to extend the protections of *Yearsley* derivative sovereign immunity to private contractors performing government work. At the same time, it accommodates the inherent differences between federal employees and private entities, as this Court implicitly recognized when it formulated the *Boyle* test. Each element of the proposed test reflects that balanced approach.

1. Did The Federal Government Exercise Judgment Or Discretion During The Contracting Process?

For the first element, a court should consider whether the federal government exercised judgment or discretion through its use of a contractor to provide the goods or services at issue. This requirement confirms the existence of a uniquely federal interest that, if other conditions are met, may conflict with third-party claims against the contractor.

A contractor may meet its burden to show this element in several ways. For example, government discretion may be established through the initial "request for proposals" that the government issues; the contractor selection process; the government contract and individual task orders issued to the contractor; statements of work issued by the

government; oversight, supervision, or review during contract implementation and performance; or other documentary, or testimonial evidence that the government exercised its discretion and judgment in the balancing of government needs, resource constraints, government priorities, and other considerations.

Importantly, this element should not require a contractor to demonstrate that the government controlled every aspect of contractor performance through the review and approval of detailed specifications. Such a requirement is inconsistent with modern acquisition practice. Rather, a court should review the submissions of the parties to determine whether, as a whole, they demonstrate that the government used discretion or judgment during the contracting process. *Boyle* directs that the government's exercise of such discretion should be immune not only from direct challenges but also from collateral attack via third-party lawsuits against the government's contractors. *See* 487 U.S. at 512.

2. Did The Federal Government Accept The Goods Or Services Provided By The Contractor With Knowledge Of Any Risks, Dangers, Or Hazards Of Which The Contractor Had Actual Knowledge?

The second element is whether evidence exists that the government accepted the goods or services required by the contract. Indicia of acceptance may be formal, such as through the government's

issuance of a "Material Inspection and Receiving Report," also known as a DD250 Form, for goods or services provided by the contractor. A contractor also may present other evidence of government acceptance, such as payment of the contractor's invoices; progress billings and final payment; favorable performance evaluations; payment of award fees or other bonuses; or other contract performance documents. In addition, evidence of long-term use by the government also would tend to indicate acceptance. *See, e.g.*, *Smith v. Xerox Corp.*, 866 F.2d 135, 138-39 (5th Cir. 1989); *Dowd v. Textron, Inc.*, 792 F.2d 409, 412 (4th Cir. 1986).

Requiring indicia of acceptance ensures that the government has exercised judgment and oversight not only during contractor selection and contract performance, but also after the contractor has performed its work, essentially bookending the contractor's performance with discretionary government decision-making.

Government acceptance must be made "knowingly"-i.e., with notice from the contractor, or independent awareness, of any risks, dangers, or hazards of which the contractor itself has actual knowledge. This condition negates the potential incentive, discussed in *Boyle*, for a contractor to withhold knowledge of risks and "cut[] off information highly relevant to the discretionary decision" of the government. 487 U.S. at 513.

3. Is The Third-Party Plaintiff Seeking To Hold The Contractor Liable For Work Or Conduct Performed Within The Scope Of The Contract?

The final element requires a contractor to demonstrate that a third-party claim raised against it relates to work or conduct that falls within the scope of the government contract. This requirement ensures that any protection afforded by derivative sovereign immunity principles or the government contractor defense is properly tailored to work actually contemplated, authorized, and accepted by the federal government in furtherance of government objectives. Allowing a claim to proceed against a contractor that acts within the parameters of its contract runs a significant risk of conflicting with the government's exercise of discretion to engage the contractor and delegate such work.

Allegations that a contractor acted negligently or breached the terms of its government contract are not sufficient to show that a contractor acted outside the scope or beyond the parameters of its contract. To hold otherwise would eviscerate the protection of derivative sovereign immunity. The Solicitor General made a similar observation in an *amicus curiae* brief that it recently filed with the Court. *See* Brief for United States as Amicus Curiae, *Kellogg Brown & Root Servs., Inc. v. Harris*, No. 13-817, 2014 WL 7185602, at *16 (U.S. Dec. 16, 2014).

Harris involved the purposes underlying the FTCA's combatant activities exception and the

extent to which they applied to private contractors. At the request of the Court, the United States opined that claims arising against a private contractor should be preempted if similar claims against the United States would fall within the combatant activities exception and if the contractor was acting within the scope of its contractual relationship. *See id.* at *4-5. The United States noted that:

> [F]ederal preemption would generally apply *even if an employee of a contractor allegedly violated the terms of the contract or took steps not specifically called for in the contract, as long as the alleged conduct at issue was within the general scope of the contractual relationship between the contractor and the federal government*. Determination of the appropriate recourse for the contractor's failure to adhere to contract terms and related directives under its exclusively federal relationship with the United States would be the responsibility of the United States, through contractual, criminal, or other remedies-not private state-law suits by individual service members or contractor employees.

Id. at *15-16 (emphasis added). The same rationale applies in cases involving derivative sovereign immunity.

4. The Modernized Test Fulfills The Purposes Of The Foundational Case Law While Accommodating The Changed Federal Acquisition Process.

This modernized construction of derivative sovereign immunity and federal preemption achieves a number of important objectives while remaining consistent with existing jurisprudence.

First, the revised test protects the federal government's sovereign immunity while acknowledging modern procurement realities. The government's discretion in its procurement efforts today is just as pervasive as in the past, although exercised in a different way. The federal interest in protecting that discretion from direct or indirect attack—a touchstone of *Boyle*—remains. The revised test reflects that unique federal interest by requiring a contractor to show that the government exercised its discretion during the contracting process as well as in the government's ultimate acceptance of the work performed.

Second, the updated test encourages contractors to exercise their expertise and best judgment when providing acceptable goods and services to the government. Contractors that do so will be protected from liability so long as they act within the scope of their contract.

Third, the updated test's acceptance element provides a safeguard, similar to the third requirement of *Boyle*, to ensure that contractors disclose risks or hazards known to the contractor but

unknown to the government. As noted by the Court in *Boyle*, this requirement ensures that contractors have no incentive to conceal dangers or risks from the government in an effort to avoid liability to third parties.

Fourth, while safeguarding these basic principles, the revised test eliminates the outdated concept from *Boyle* that the government must have provided input on each discrete decision or action by the contractor. Instead, the protection exists so long as the contractor was acting within the parameters of work set forth by the government. The contractual provisions, statements of work, and other governmental directions define the scope within which a contractor may act in the performance of the government's requirements. A contractor exceeds its authority only when it acts outside that scope.

Fifth, this upgraded test also dispenses with the artificial distinctions that lower courts have raised between contracts for products and contracts for services; between design and construction contracts; between military and civilian government contracts; between the government's prescription and proscription of warnings, etc.

Finally, the revised test ensures that the protection extended to contractors performing work for the United States is consistent with the immunity accorded to the United States itself. Just as the government's exercise of discretion is protected even when that discretion is allegedly abused or negligently applied, the contractor's

performance is protected, even if allegedly deficient in some way.

In short, the revised test proposed by NDIA accommodates modern acquisition policy and resolves jurisprudential inconsistencies. Most importantly, the test ensures that the unique federal interests identified in *Boyle* remain protected, both directly and indirectly, and the federal government receives from its contractors their best expertise and judgment.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Petitioner's brief and the briefs of the other *amici curiae* supporting the Petitioner, the decision of the court of appeals should be reversed.

Respectfully submitted,

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In The Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND NATIONAL EMPLOYMENT LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The National Employment Law Project ("NELP") is a non-profit legal organization with over 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers.

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[1] Pursuant to this Court's Rule 37.3(a), both parties submitted letters to the Clerk granting blanket consent to amicus curiae briefs. Pursuant to this Court's Rule 37.6, amici state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

NELP's areas of expertise include the workplace rights of low-wage workers under federal employment and labor laws, with a special emphasis on wage and hour rights. Employment rights are virtually meaningless if workers cannot join together in a collective or class action to seek protections, and upholding the procedural rights for workers under these mechanisms is therefore paramount to ensuring those protections. NELP has litigated and participated as amicus in numerous cases addressing the rights of workers under the Fair Labor Standards Act and related state laws in most federal circuits and in the U.S. Supreme Court.

Amici have an abiding interest in the protection of the legal rights of working men and women. The artificial jurisdictional limits advanced by Petitioner would seriously impair the ability of employees – among others – to have their day in court. Amici submit this brief to explain why the Ninth Circuit's judgment should be affirmed.

SUMMARY OF ARGUMENT

An offer of relief does not place a valid "case" or "controversy" beyond the reach of an Article III court. As this Court has repeatedly cautioned, "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Service Employees International Union*, 132 S. Ct. 2277, 2287 (2012). An offer does not

render a court powerless to issue a judgment on liability and damages.

Petitioner's mootness-by-offer theory finds no support in the historical record. Instead, the theory finds its roots in now discredited circuit case law dating back only one generation. As more modern cases have since concluded, the mootness-by-offer theory rests on a series of mistaken assumptions about the nature of federal jurisdiction.

In the context of a class action, an offer of relief to the named plaintiff fails to defeat standing for an additional reason: a plaintiff in a class action asserts the common interests of a group. The historical record demonstrates that representative litigation – where a person stands in the shoes of a group and pursues the interests of that group – was well-established and understood at the time of the framing of the U.S. Constitution. In such cases, an offer to the named plaintiff does not satisfy the interests of the class validly asserted in the case or controversy.

Petitioner's theory, if accepted, would work a host of problems on courts, parties, and citizens. Allowing defendants to "pick off" class action plaintiffs would put a variety of illegal conduct beyond the reach of the law, with damaging consequences to various parties subjected to common harm. The Constitution does not contemplate such a result.

ARGUMENT

I. AN OFFER OF RELIEF DOES NOT DEFEAT A VALID CASE OR CONTROVERSY.

An offer of relief is just that: an offer. It does not operate as a light switch allowing defendants to choose when federal courts have the constitutional authority to act. The historical record, this Court's precedents, and common sense all confirm that an offer of relief does not render the case moot.

A. The Historical Context of Mootness and Offers of Relief.

The historical record in this case is of particular significance. After all, Petitioner's mootness-by-offer theory does not rely on any intervening change between 1789 and the present. Presumably, if a valid "case" or "controversy" could be negated by an offer, such a jurisdictional limitation would have been widely understood during the founding era of the Constitution. But the exact opposite is true: it was widely accepted that an unaccepted offer "leaves the matter as if no offer had ever been made." *Minneapolis & St. Louis R. Co. v. Columbus Rolling Mill*, 119 U.S. 149, 151 (1886).

This Court began to grapple with the concept of mootness as a jurisdictional limitation as far back as the mid-1800s. In *Lord v. Veazie*, the Court confronted a case where two litigants proceeded with a feigned dispute in pursuit of a judgment that would serve their aligned interests in the outcome of the case. 49

U.S. 251 (1850). The Court dismissed the action, pointing out that the courts were designed to resolve disputes featuring a "real and substantial controversy." *Id.* at 255.

The Court built upon that principle in *Lord* in *Cleveland v. Chamberlain*. There, the parties had litigated a dispute at the lower court level, with one obtaining judgment and the other appealing. 66 U.S. 419, 425 (1861). In the time between the judgment and the Supreme Court's hearing of the case, the appellant acquired the appellee's interest in the judgment, but nevertheless pressed forward with his appeal despite retaining interest in both sides of the dispute. *Id.* The Court, relying on *Lord*, dismissed the case, holding that while there was undoubtedly a "controversy" when the lower court's judgment was rendered, the appellee's subsequent transfer of his interest to the appellant ended the controversy and, by extension, mooted the case on appeal. *Id.* at 425-26.

Between the 1860s and 1891, this Court issued several "mootness" dismissals developing the precedent established by *Lord* and *Cleveland*. *See Paper Co. v. Heft*, 75 U.S. 333 (1869); *San Mateo Co. v. Southern Pac. R. Co.*, 116 U.S. 138 (1885); *Little v. Bowers*, 134 U.S. 547 (1890); *Manufacturing Co. v. Wright*, 141 U.S. 696 (1891).

However, it was not until 1893 that the Court entertained the notion that a case could be rendered moot by virtue of a defending party's unaccepted

provision of full relief. In *People of State of California v. San Pablo & T.R. Co.*, the state of California brought an action against a railroad company seeking recovery of unpaid taxes and, prior to the Supreme Court's hearing of the case, the railroad company tendered payment of the full amount owed. 149 U.S. 308, 314 (1893). Though California did not accept the tender, the railroad company nonetheless deposited the full amount owed into a state bank account. *Id.* In accordance with California law, such a deposit had the effect of extinguishing claims against the debtor. *Id.* The Supreme Court dismissed the case, ruling that California, having "received" full payment under state law despite its attempts to reject the railroad company's tender, had come to possess all that it could gain through litigation and therefore, retained no legally cognizable interest in further litigation. *Id.* Because California state law explicitly regarded the railroad company's deposit as the legal equivalent of the state accepting payment, the railroad company's "offer" was functionally immune from rejection. *Id.*

Between the 1890s and the present, the Court reaffirmed the collective principles established in *Lord*, *Cleveland*, and *San Pablo*. *See, e.g.*, *Powell v. McCormack*, 395 U.S. 486, 496-98 (1969) (reaffirming that a case remains live so long as the parties have a "concrete" interest in the litigation in which the court could provide some form of relief); *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (a plaintiff's claim is not moot "[a]s long as [he has] a concrete interest, however small, in the outcome of the litigation.").

Importantly, however, this Court applied a functional approach to determining jurisdictional limits. For example, in cases where there was not a "live" controversy in the traditional sense, but where the controversy was capable of repetition that would evade review, this Court reaffirmed the power of the judiciary to provide relief. *See Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 756 (1976).

B. This Court Rejects the Mootness-by-Offer Theory in *Roper*.

The mootness-by-offer theory advanced by Petitioner made its debut in the circuit courts in 1977.

In *Winokur v. Bell Fed. Sav. & Loan Ass'n*, plaintiff depositors brought a class action suit against a savings and loan for alleged deceptive advertising. 560 F.2d 271, 273 (7th Cir. 1977). The defendant subsequently changed its disputed practices and tendered the claimed damages and court costs to each plaintiff. *Id.* On the basis of these actions, the district court determined that the plaintiffs ceased to have a stake in the controversy and dismissed the action as moot. *Id.* On appeal, the Seventh Circuit affirmed the ruling, finding that the tender of costs and damages to the plaintiffs and the abandonment of the disputed practices provided the plaintiffs with all that they could obtain in the course of litigation and that, as such, there was no live controversy left to resolve and

the court lacked jurisdiction to hear any further proceedings as to the individual claims of the named plaintiffs. *Id.* at 274. The court further held that, given the absence of a live controversy between the named plaintiffs and the defendant, the court did not have jurisdiction to review the district court's denial of class certification. *Id.*

Shortly after the Seventh Circuit issued its decision in *Winokur*, the Fifth Circuit reached the opposite conclusion in a similar case, holding that where defendants offer complete individual relief to named plaintiffs in a class action, those plaintiffs maintained an individual interest in sharing costs of litigation with other class members (and therefore standing to continue litigating). *See Roper v. Consurve, Inc.*, 578 F.2d 1106 (5th Cir. 1978).

This Court's 1980 decision in *Roper* was intended to resolve the circuit split as to the mootness issue. There, credit card holders brought a class action suit against a national bank, alleging violations of usury laws in Mississippi. *Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 328 (1980). After the named plaintiffs were denied class certification, the defendant bank offered to submit to an adverse judgment and provide the named plaintiffs with the maximum awards allowable by law. *Id.* at 329. On the basis of the bank's offer, the district court entered judgment in favor of the plaintiffs. *Id.* at 330. The Fifth Circuit reversed and remanded, holding that the case was not moot. *Id.* This Court affirmed, holding that neither the bank's tender nor the

district court's judgment mooted the plaintiff's case or controversy because each plaintiff maintained an individual interest as to the question of class certification, which, if granted, could allow for sharing of costs with fellow class members. *Id.* at 336. The Court further noted that "[t]o deny the right to appeal simply because the defendant has sought to 'buy off' the individual private claims of the named plaintiffs would be contrary to sound judicial administration." *Id.* at 339.

C. After *Roper*, Courts Continue to Hold that an Offer of Relief Only Moots an Individual Claim.

In the wake of *Roper*, some courts erroneously persisted in accepting defendants' theory an offer of relief could moot an individual claim.

In *Rand v. Monsanto*, the Seventh Circuit became the first circuit court to endorse the mootness-by-offer argument in conjunction with Rule 68. There, Judge Easterbrook held that an offer had the effect of ending the controversy between the parties because there was no longer a conflict over which to litigate. 926 F.2d 596, 598 (7th Cir. 1991). Nonetheless, Judge Easterbrook recognized that, under *Roper*, "the dispute about certification of the class survives." *Id.* Other circuits, relying on *Rand*, soon followed the Seventh Circuit's lead. *See McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 340 (2d Cir. 2005); *Colbert v. Dymacol*, 302 F.3d 155 (3d Cir. 2002); *Warren v.*

Sessoms & Rogers, P.A., 676 F.3d 365, 370 (4th Cir. 2012); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 919 (5th Cir. 2008); *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567 (6th Cir. 2009).

D. Following *Genesis*, Circuit Courts Acknowledge that an Offer of Relief Does Not Moot a Claim.

Although this Court's decision in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013) failed to resolve the first Question Presented here, the decision did move many circuit courts to re-examine their positions.

Most notably, Judge Easterbrook, writing for the Seventh Circuit, recently acknowledged the error of the mootness-by-offer theory, overruling *Rand*. *See Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878 (7th Cir. Aug. 6, 2015). *Chapman*, like this case, involved a Rule 68 offer allegedly providing the named plaintiff total relief. *Id.* at *2. Noting that "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party[,]" the court had little trouble concluding the case was not moot. *Id.* After all, "[t]he district court could award damages and enter an injunction. [The plaintiff] began this suit seeking those remedies; he does not have them yet; the court could provide them." *Id.*

All other circuit courts that have examined the mootness-by-offer theory post-*Genesis* have rejected

the argument. *See, e.g.*, *Tanasi v. New Alliance Bank*, 786 F.3d 195 (2d Cir. 2015); *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, ___ U.S. ___, 135 S. Ct. 2311, 191 L.Ed.2d 977 (2015); *Hooks v. Landmark Industries, Inc.*, No. 14-20496, 2015 WL 4760253 (5th Cir. Aug. 12, 2015); *Bais Vaakov of Spring Valley v. ACT, Inc.*, No. 14-1789, 2015 WL 4979406 (1st Cir. Aug. 21, 2015).

E. An Offer of Relief Does Not Moot a Plaintiff's Claim.

In light of the forgoing, there is now little question that an offer of relief, standing alone, does not deprive a court of its judicial power.

Petitioner's theory finds no support in the relevant constitutional history. There is simply no indication that, prior to circuit cases beginning in 1977, there was any understanding that an offer of relief removed a dispute from the categories of "cases" or "controversies." As this Court has recognized, "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions[.]" *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014). Indeed, "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008).

The absence of any credible historical indication that an offer eliminates Article III jurisdiction must

weigh heavily against the "discovery" of such a limitation 226 years after the Constitution was ratified. *See* Transcript of Oral Argument at 11, *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11-398) (when a constitutional claim is "unprecedented," there is a "heavy burden of justification") (Kennedy, J.).

This Court's decision in *San Pablo* is not to the contrary. *San Pablo* turned on the crucial fact that, under California law, the defendant's deposit into a state account eliminated the underlying dispute by operation of law. In that scenario, it would have been "impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox*, 132 S. Ct. at 2287. *San Pablo* cannot be read so broadly as to hold that *any* offer of relief operates to moot the underlying claim.

As Justice Kagan emphasized dissenting in *Genesis*, Petitioner's argument fares no better examined as a matter of common sense. When a plaintiff rejects such an offer, "her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer – like any unaccepted contract offer – is a legal nullity, with no operative effect." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1533 (Kagan, J., dissenting).

This Court should reject Petitioner's argument and hold that on offer of relief, standing alone, does not moot a plaintiff's claim.

II. AN OFFER OF RELIEF CANNOT MOOT A CLASS ACTION.

There are good reasons why the mootness-by-offer theory advanced by Petitioner in this case almost always arises in the context of class actions. In an individual case, defendants rarely offer to fall on their own sword and offer complete relief. It is even rarer for a plaintiff to reject all she could hope to recover.

Class actions are another matter. In a class action, an offer of full relief to the named plaintiff is no mea culpa. It is an attempt to evade classwide liability and damages. The price to be paid to a single plaintiff will usually pale in comparison to the measure of common harm.

In the class context, an offer of relief made solely to the named plaintiff cannot eliminate the underlying case or controversy. A named plaintiff assumes a fiduciary relationship with the class. When such a plaintiff files a complaint raising class allegations, he asserts an interest in serving as a representative of the group. That interest cannot be extinguished with an individual offer of relief.

A. The Historical Record Establishes that Representative Actions Are Firmly Rooted as Cases and Controversies.

Although Petitioner's mootness-by-offer theory finds no support in history, there is robust and long standing support for the prosecution of representative

actions in Anglo-American courts. Representative actions were understood to allow a single plaintiff to stand in the shoes of a distinct legal entity – the class – and assert the common interests of that class. The prevalence of this understanding demonstrates that the Constitution does not contemplate a mechanism by which any class action defendant can avoid liability by making an offer to the named plaintiff.

"[G]roup litigation has a remarkably deep history" dating back to medieval times. Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 Ariz. L. Rev. 687, 687 (1997); Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action 21 (1987).

As this Court recognized more than 160 years ago: "[W]here the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest." *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 298 (1853). The class action device "treats individuals falling within a class definition as members of a group rather than as legally distinct persons." *Neale v. Volvo Cars of North America, LLC*, No. 14-1540, 2015 WL 4466919 at *7 (3d Cir. July 22, 2015) (citing *Sosna v. Iowa*, 419 U.S. 393, 399 (1975)).

These authorities contemplate that when a plaintiff files a class action lawsuit, he asserts an

interest on behalf of the proposed class. The interests of the class cannot be rendered moot by an offer to the named plaintiff.

B. A Named Plaintiff Represents a Putative Class When the Class Action Is Filed.

Petitioner and its amici do not deny the representative character of class actions, but instead offer an evasion. According to Petitioner, a named plaintiff has no interest in representing a class until the district court has certified the class.

Once again, the argument runs afoul of history and this Court's precedent.

Petitioner's assertion that a class action does not exist before certification ignores the relevant history. Prior to the 1966 revisions to the Federal Rules, Rule 23 contained no certification requirement at all. *See* Fed. R. Civ. P. 23 (1964). The same is true of Equity Rule 38, which preceded the federal rules. *See* James Love Hopkins, The New Federal Equity Rules 231 (1930). Surely the named plaintiffs in cases filed before 1966 validly asserted the rights of the class.

The Advisory Committee notes accompanying the 1966 amendments reinforce the same point. A named plaintiff asserts the interests of a class when she files a class action complaint. A district court's order granting certification merely *ratifies* the class action character of the case. And when a court denies certification, "the action should be *stripped of its character*

as a class action." Fed. R. Civ. P. 23(c)(1) advisory committee's note to 1966 amendment (emphasis added).

This Court's precedents point in the same direction. Petitioner's argument cannot be squared with *Roper*. *Roper* held that neither the defendant's tender to each plaintiff of the maximum amount that each could have recovered nor the district court's entry of judgment in favor of plaintiffs over their objections mooted plaintiffs' case or controversy. The only difference between *Roper* and this case is the timing of the offer. Here, the offer was made before a ruling on certification, in *Roper*, after certification was denied. The distinction is of no consequence. If anything, the defendant in *Roper* was on stronger footing: a court had already entered an order denying certification, "strip[ing the case] of its character as a class action." Here, by contrast, the case retained its character as a class action, subject to later review by the court in certification proceedings. There is simply no sound basis to distinguish this case from *Roper*.

Petitioner's argument also runs counter to this Court's decision in *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974). *American Pipe* held that "the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *Id.* at 553. Implicit in *American Pipe*'s holding is the precept that the *filing* of a class action – even absent eventual certification – affects the

rights and interests of unnamed class members. *American Pipe* cannot be reconciled with Petitioner's argument that the class is a legal nullity prior to certification.

Petitioner's heavy reliance on *Genesis Healthcare* is misplaced. It does not lend Petitioner support. In *Genesis*, the Court confronted the highly unusual situation of a sole named plaintiff in a collective action brought under the Fair Labor Standards Act. Plaintiff there *conceded* – unlike Respondent Gomez here – that his claim, asserted on behalf of himself and others similarly situated, was moot, due to an offer of individual relief only made under Rule 68. Under those circumstances, the Court concluded, the plaintiff had "no personal interest in representing putative, unnamed claimants." 133 S. Ct. at 1532. Moreover, the Court's ruling assumed, but did not decide, that an unaccepted Rule 68 offer can render a claim moot, *id.*, the very question at issue in this case. In fact, Justice Kagan found the circumstances of the case so incredulous that, in her dissent, she counseled practitioners to "[f]eel free to relegate the majority's decision to the further reaches of your mind: The situation it addresses should never again arise." *Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting) (recognizing that the unique legal and procedural posture of *Genesis* made it "the most one-off of one-offs"). The *Genesis* plaintiff's concession that his individual claim was moot foreclosed in that case, which is not replicated here, valid arguments that a named plaintiff in a mass action maintains an

individual interest in class or collective treatment. *E.g.*, *Roper*, 445 U.S. at 336 (named plaintiff's individual interest in spreading costs sufficient to maintain Article III standing).

A plaintiff who asserts the rights of a class represents the interests of that class even before certification. It follows that an offer to provide only individual relief to the named plaintiff cannot satisfy that plaintiff's obligation to represent the interests of the class.

III. PETITIONER'S MOOTNESS-BY-OFFER THEORY UNDERMINES THE RULE OF LAW.

Petitioner's theory, if accepted, would create serious barriers to the vindication of substantive legal rights and undermine the established rule of law.

Suppose, for example, that an employer refused to hire women. The law provides a remedy. An aggrieved applicant can sue, stand in the shoes of other similarly-situated applicants, and obtain relief for the class. *See Teamsters v. United States*, 431 U.S. 324 (1977). Under Petitioner's theory, however, the employer could eviscerate a court's jurisdiction by offering the named plaintiff money and an injunction tailored only to her. The employer could continue its illegal practice (unless it was sued by every last victim or enjoined by an executive agency).

Suppose a group of corporate officers decided to steal from a public company and hide the fraud from shareholders. The law provides a remedy. *See, e.g.*, *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). But if Petitioner's mootness-by-offer theory is accepted, the offending officers could simply pay off the named plaintiffs and go about their business, leaving hundreds or perhaps many thousands of other claimants without a remedy.

Or suppose that a group of insureds is collectively owed $1 million, but the common insurance company can only afford to pay a total of $500,000 in claims. Once again, the law affords a sensible remedy: a mandatory "limited fund" class, which is required "when claims are made by numerous persons against a fund insufficient to satisfy all claims." *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1303 (2d Cir. 1990) (quoting Advisory Committee Notes to Fed. R. Civ. P. 23(b)(1)(B)). According to Petitioner, however, the Constitution requires what Rule 23 forbids: a full offer of relief to a single insured renders the court powerless to protect innocent class members whose claims are diluted or rendered worthless by the payoff to the named plaintiff.

Petitioner and its amici attempt to focus the Court's attention on burdens imposed by class actions that they deem frivolous. But make no mistake: the unprecedented constitutional mootness rule advanced by Petitioner would throw the baby out with the bathwater, rendering all manner of valid claims

immune from effective vindication. The Constitution does not require such a result.

In addition to undermining the rule of law, Petitioner's mootness-by-offer theory, if accepted, would work a serious hardship on courts, administrative agencies, and ultimately citizens. A principal purpose of Rule 23 class actions is to promote "efficiency and economy of litigation." *American Pipe*, 414 U.S. at 553. Under Petitioner's theory, courts' role would shift from resolving common disputes to presiding over endless rounds of whack-a-mole between plaintiffs and defendants in repetitive individual suits. And by removing private enforcement as a viable option to vindicate common harm, administrative agencies will be forced to fill the void, playing a far greater role in the resolving disputes.

This Court has always employed a functional understanding on the limits of a court's ability to grant relief. This Court adjudicates only genuine disputes between adverse parties, where the relief requested would have a real impact on the legal interests of those parties. *See Church of Scientology v. United States*, 506 U.S. 9, 12 (1992). When the dispute between the parties is genuine, this Court has consistently rejected the same kinds of formalistic arguments advanced by Petitioner here. *See Southern Pacific Terminal*, 219 U.S. at 515; *Roper*, 445 U.S. at 339.

That same functional understanding must inform the Court's decision here. Finding a constitutional

right to end disputes by offer would come with serious negative consequences.

This Court should reject Petitioner's plea for dismissal by pretending there is nothing left for the court to decide or do. An unaccepted offer of relief does not the end the case.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

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IN THE

Supreme Court of the United States

CAMPBELL-EWALD COMPANY,
Petitioner,

v.

JOSE GOMEZ,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

Amicus curiae addresses the following two questions:

1. Does a settlement offer of "complete relief" eliminate an Article III case or controversy and render the case moot?

2. If the answer to the first question is "yes," can a class-action defendant moot the entire case by offering "complete relief" only to the representative plaintiff and only on the representative plaintiff's individual claims?

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Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356 (1967) 4

41 McLaughlin on Class Actions (11th ed.) § 1:1 4

13A C. Wright *et al.*, FEDERAL PRACTICE & PROCEDURE (2d ed. 1984)

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INTEREST OF THE *AMICUS CURIAE*

The National Right to Work Legal Defense Foundation, Inc.,[1] is a nonprofit, charitable legal aid organization providing free legal assistance to individuals whose rights are infringed by compulsory unionism arrangements. Since its founding in 1968, the Foundation has been the nation's leading litigation advocate against compulsory union fee requirements, and in seeking redress for violations against existing prohibitions on such requirements.

Currently, Foundation staff attorneys represent workers in more than one hundred federal, state, and administrative cases involving forced union fee requirements. Foundation attorneys have represented workers in almost all of the public-sector compulsory union fee cases that have come before this Court.[2] These include *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Teachers Local No. 1 v. Hudson*, 475 U.S. 292 (1986), *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), *Davenport v. Washington Education Assn.*, 551 U.S. 177 (2007), *Locke v. Karass*, 555 U.S. 207 (2009), *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277 (2012), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *cf. Ellis v. Railway Clerks*, 466 U.S. 435 (1984) (compulsory fee case under the Railway Labor Act), *Communications*

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[1] In accordance with Supreme Court Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or part, and that no party's counsel, no party, and no person other than *amicus*, its members, and its counsel, made a monetary contribution intended to fund preparation or submission of this brief. Petitioner's and Respondent's counsel have lodged with the Clerk letters granting blanket consent to the submission of *amicus* briefs.

[2] *See* http://www.nrtw.org/en/foundation-cases.htm (last visited 30 Aug. 2015).

Workers of America v. Beck, 487 U.S. 735 (1988) (compulsory fee case under the National Labor Relations Act), *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998) (same), and *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998) (compulsory fee case under RLA).

Knox, *supra*, and *Davenport*, *supra*, were both certified as class actions, and obtained relief for more than 42,000 and more than 10,000 public employees, respectively.[3] Furthermore, Foundation staff attorneys have represented or are representing classes of public employees in literally dozens of class-action cases to vindicate their existing rights violated under compulsory-unionism agreements. A small sampling of these cases includes *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987) (class of 200 Michigan state employees), *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992) (more than 57,000 Pennsylvania state employees), *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807 (9th Cir. 1997) (reversing denial of class certification in two of three cases consolidated for decision, with classes of 500 and 165 Alaska teachers), *Reese v. City of Columbus*, 71 F.3d 619 (6th Cir. 1996) (2,000 municipal employees), *Bromley v. Michigan Education Ass'n*, 82 F.3d 686 (6th Cir. 1996) (reversing denial of class certification; 500 Michigan public-school teachers), *Cummings v. Connell*, 316 F.3d 886 (9th Cir. 2003) (37,000 California state employees), *Mitchell v. Los Angeles Unified School District*, 744 F. Supp. 938 (C.D. Cal. 1990), *rev'd on other grounds*, 963 F.2d 258 (9th Cir. 1992) (more than 10,000 Los Angeles teachers), and *Swanson v. University of Hawaii Professional*

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[3] *Abood* and *Ellis* each were consolidations of two separate cases, one of which was a class action.

Assembly, 212 F.R.D. 574 (D. Haw. 2003) (1,100 public university professors).

The Foundation submits this brief to urge affirmance of the judgment of the United States Court of Appeals for the Ninth Circuit as to the first two questions presented, if the Court finds it necessary to reach them at all. The Foundation takes no position as to the third question presented, but respectfully suggests that resolution contrary to the position being urged by Respondent Jose Gomez ("Gomez") would moot consideration of the first two questions.

STATEMENT OF THE FACTS

Amicus adopts the Statement of the Facts and the Proceedings Below set forth in the Brief for the Respondent ("Resp. Br."), at 4-9.

SUMMARY OF ARGUMENT

The core issue posed by the first two Questions Presented is whether a defendant in a class action case can frustrate the remedial purposes of Rule 23's policies by picking off the named plaintiff to evade litigation of a claim that could otherwise award the full measure of relief sought for, and on behalf of, all of the defendant's victims. Where, as here, each individual claim is relatively small from an economic perspective, the class action device is a necessary and effective instrument to aggregate claims to render litigation economically and practically feasible for and on behalf of the victims. With these considerations in mind, Rule 68 offers of judgment should be barred in putative class actions—*i.e.*, prior to the determination of class status—as allowing them would permit defendants to frustrate the efficiencies and economies contemplated by Rule 23, and create insoluble ethical and fiduciary

conundrums for prospective class representatives and class counsel.

ARGUMENT

More than a century ago, Rule 23, Fed.R.Civ.P., established standards for the pursuit of collective actions in the Federal courts. *See, e.g.*, Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 380-86 (1967), *cited in Snyder v. Harris*, 394 U.S. 332, 342 (1969). The class action "is a procedural device . . adopted with the goals of economies of time, effort and expense, uniformity of decisions, the promotion of efficiency and fairness in handling large numbers of similar claims." 41 McLaughlin on Class Actions, § 1:1 (11th ed.), *citing In re West Virginia Rezulin Litigation*, 214 W. Va. 52, 585 S.E.2d 52, 62 (2003); *see also Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir. 2004) ("'The class action is a *procedural* device intended to advance judicial economy by trying claims together that lend themselves to collective treatment'") (quoting *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000) (emphasis added).

This case concerns, *inter alia*, whether a mass wrongdoer may "pick off" a prospective class representative by making an offer of judgment to the named plaintiff who filed the class action, and doing so: (1) before consideration of whether class treatment is appropriate; (2) in a manner that offers relief only to *that* claimant; and (3) under circumstances that lead that plaintiff to reject the offer, specifically, by offering less than all of the relief sought, including relief for the class, in the Complaint. The Court is thus presented in the general class-action context a question which it

was unable to reach in *Genesis HealthCare v. Symczyk*, 133 S. Ct. 1523, 1528-29 (2013).[4]

Similarly, this case presents a rare opportunity to clarify what one district court has recently described as the "opaque" "nature and extent of the legal status of a class prior to certification." *Epps v. Wal-Mart Stores, Inc.*, — F.R.D. —, 2015 WL 2408630, at *7 (E.D. Ark. May 21, 2015). This Court has strongly suggested that plaintiffs owe a fiduciary duty to absent class members prior to class certification. *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013), *citing with approval Back Doctors Ltd. v. Metropolitan Property & Cas. Ins. Co.*, 637 F.3d 827, 830-31 (7th Cir. 2011) (noting a class representative's fiduciary duty not to "throw away what could be a major component of the class's recovery"). This suggestion should be made explicit to address the ethical considerations raised by defendants' efforts to "pick off" named plaintiffs asserting class claims. Put simply, Rule 68 should not be available in class action cases prior to certification, because it creates irremediable conflicts at odds with the duties of class representative and class counsel during that pre-certification period, and could be an instrument fostering evils far outweighing its utility in other types of cases.

Indeed, the outcome suggested by Campbell-Ewald and its *amici* would incentivize two problematic outcomes. First, litigants would be encouraged to add class allegations to individual claims to extract individually lucrative settlements from defendants facing liability to large classes of grievants, without fear of

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[4] *Genesis Healthcare* was presented in the related but distinguishable context of "collective actions" pursuant to section 16(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b).

ethical or fiduciary restraints. Furthermore, defendants would be encouraged to negotiate "quickie" individual settlements in prospective class actions, shortchanging or ignoring completely the interests of absent prospective class members. Neither outcome serves the ends of justice. Explicit imposition of heightened duties whenever class allegations are raised is a necessary corollary to affirming a prospective class representative's continuing standing in the face of an effort to buy off his individual claim to defeat class treatment.

The dominant rule among a majority of circuits—that a class has sufficient legal status from the time that the complaint is filed so that a case or controversy exists even if the defendant offers full individual relief to the named plaintiff—is a compelling proposition that should be adopted by this Court for the reasons demonstrated below.

I. An Unaccepted Offer of Judgment and/or Settlement Offer Cannot Moot a Class-Action Case.

It cannot be gainsaid that there was never an accepted offer in this case, nor satisfaction and accord, because Gomez "refused to accept Campbell-Ewald's tender and, instead, insisted that he was entitled to litigate the class action." Pet. Brief at 2. Thus, Campbell-Ewald's argument is that its offer of judgment alone mooted Gomez's claim, along with the claims of the class in this case, even though judgment was never entered on the terms offered and Gomez did not receive any of the offered relief.

Such a result would turn long-settled mootness doctrine on its head. This Court recently reaffirmed that "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the

prevailing party." *Knox v. Service Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (citation and internal quotation marks omitted). Here, the District Court could still have granted Gomez "effectual relief." Indeed, it could still grant Gomez all of the relief he sought, including relief to the class. The offer *proposed* that the District Court grant him relief, but the court never did; instead, it dismissed his claims as barred by "derivative sovereign immunity." Resp. Br. at 9. And while Campbell-Ewald insists that, even if this ruling (reversed by the Ninth Circuit) is unsound, its individual Rule 68 offer and/or settlement offer mooted the case, Pet. Br. at 10, 11, 19-22, even though Gomez still has not received either a judgment or a single penny of relief for himself, or for the class.

The self-contradictory nature of Campbell-Ewald's argument in this regard is discussed in detail in Respondent's Brief at 13-17, and need not be repeated here. Briefly put, the notion that a Rule 68 offer or settlement offer can somehow moot a case is plainly inconsistent with the proposition that a court responds to an accepted Rule 68 offer by entering judgment on the terms specified therein. By hypothesis, a case cannot be moot—requiring dismissal—if a court retains the power to enter judgment.

This Court has never permitted a rejected Rule 68 offer to moot a class action. The closest it has come to doing so is in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980). But even there, the Court *entered* judgment in favor of the plaintiffs and tendered them relief, so this Court never reached the question of whether a mere offer of complete relief without judgment and tender of relief can moot a case. Indeed, in the class-action context, an offer of complete individual relief rarely, if ever, can fully satisfy the

class demands of the complaint, and a district court cannot force a plaintiff to accept a suboptimal settlement. As Justice Rehnquist explained in his *Roper* concurrence:

> The action is moot in the Art. III sense only if this Court adopts a rule that an individual seeking to proceed as a class representative is required to accept a tender of only his individual claims. So long as the court does not require such acceptance, the individual is required to prove his case and the requisite Art. III adversity continues. Acceptance need not be mandated under our precedents since the defendant has not offered all that has been requested in the complaint (*i.e.*, relief for the class) and any other rule would give the defendant the practical power to make the denial of class certification questions unreviewable.

445 U.S. at 341 (Rehnquist, J., concurring). This case is far stronger than *Roper*, in which "the District Court entered judgment in [plaintiffs'] favor, over [plaintiffs'] objection, and dismissed the action. The bank deposited the amount tendered into the registry of the court." *Id.* at 330 (majority opinion). Campbell-Ewald never tendered, and Gomez never received, anything.[5] The suggestion that this mooted his class claims, then, must be rejected.

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[5] Petitioner uses the term "tender" inaccurately in its Petition and Brief, attempting to fit the round peg of its actions into the square hole of the legal requirements for tender of actual financial relief. Thus, while it only "tendered an offer of judgment," Pet. at 5, and conditions its offer to "arrange for prompt payment" upon Respondent's acceptance, Pet. App. at 59a., it casually uses the word in its Brief, Pet. Br. at 2, 6, to suggest that its offer of a Rule 68 judgment and offer of settlement actually put the

II. Adoption of the Mootness-by-Offer-of-Complete-[Individual]-Relief Theory Would Allow Mass Wrongdoers to Frustrate Efforts to Obtain Relief Commensurate with Their Class-Wide Wrong.

From the earliest days of the Republic, this Court has recognized that "[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803). The Rule 68 device utilized by Campbell-Ewald prior to determination of class certification is at war with this elementary principle of American jurisprudence in the context of this case.

Even if an unaccepted offer of judgment could moot a non-class action case, it does not moot this one, as it was brought by Gomez as a class action under Rule 23. Article III does not require district courts to dismiss class actions as moot where a defendant picks off the named plaintiff through a Rule 68 offer of judgment offering no relief whatsoever to the absent class members prior to the court's class determination. *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (recognizing circumstances where the fact "[t]hat the class was not certified until after the named plaintiffs' claims had become moot does not deprive [the Court] of jurisdiction."); *see also Roper*, 445 U.S. at 339 (allowing defendants to use Rule 68 to "buy off" or

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requested monetary relief into Gomez's hands. It did not, and it is disingenuous to contend before this Court that Campbell-Ewald "made [a] tender of complete relief." Pet. Br. at 11. Neither is it "tender of the relief sought," *id.* at 16, and therefore should not be confused with cases in which a defendant "tendered to the plaintiff a sum of money equal" to the judgment sought. *Id.* at 17.

"pick[] off" named plaintiffs before a class certification ruling could be obtained would be "contrary to sound judicial administration").

The Rule 68 offer here was used in a manner that this Court condemned in *Roper*. The Rule 68 offer did not resolve the class allegations, nor provide relief to the class sought. Gomez maintains a personal interest in the case proceeding as a class action. Therefore, Article III jurisdiction remains and this class action suit cannot be dismissed on Article III grounds.

A. A Putative Class Representative Cannot Ignore the Interests of the Class by Accepting an Offer which Fails to Provide Class-wide Relief.

Absent from the various analyses presented to the Court in the briefing thus far is discussion of the prospective or certified class representative's pre-certification duties to the class in the context of settlement offers which—while purportedly providing "complete relief" to the named plaintiff/class representative—provide lesser or no relief to absent class members.

This Court's established rule is that a class-action plaintiff and class counsel owe fiduciary duties to the absent class members, and these duties attach upon the filing of a class-action complaint. *Roper*, 445 U.S. at 331 (class representatives have a responsibility to "represent the collective interests of the *putative* class") (emphasis added); *Knowles*, 133 S. Ct. at 1349.[6] Numerous lower Federal courts have similarly described

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[6] This principle is consistent with the principle that the filing of a class action complaint tolls the statute of limitations as to all of the potential members of the class. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983).

the relationship between class representative and absent class members as a "fiduciary" duty.[7] The existence of this duty even for aspiring class representatives alone would suggest that litigants alleging the existence of a class and seeking representative status are precluded from accepting settlement offers which provide relief only to themselves. And *Roper* anticipates justification for class treatment, as well:

> A significant benefit to claimants who choose to litigate their individual claims in a class-action context is the prospect of reducing their costs of litigation, particularly attorney's fees, by allocating such costs among all members of the class who benefit from any recovery. Typically, the attorney's fees of a named plaintiff proceeding without reliance on Rule 23 could exceed the value of the individual judgment in favor of any one plaintiff. Here the damages claimed by the two named plaintiffs totaled $1,006.00. Such plaintiffs would be unlikely to obtain legal redress at an acceptable cost, unless counsel were motivated by the fee-spreading incentive and proceeded on a contingent-fee basis. This, of course, is a central concept of Rule 23.

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[7] *In re Dry Max Pampers Litigation*, 724 F.3d 713, 718 (6th Cir. 2013); *Back Doctors Ltd.*, 637 F.3d at 830-31 (noting a class representative's fiduciary duty not to "throw away what could be a major component of the class's recovery"); *see also Martens v. Thomann*, 273 F.3d 159, 173 n.10 (2d Cir. 2001); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 4 (1st Cir. 1999); *Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989); *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987); *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1306 (4th Cir. 1978).

Roper, 445 U.S. at 338 n.9. On this basis alone, Gomez maintains a cognizable outcome in the litigation sufficient to retain standing under Article III.[8] "Complete relief" was never offered by Campbell-Ewald, was never conceded by Gomez.[9] Losing Article III standing on the basis advanced by Campbell-Ewald and its *amici* is inconsistent with this Court's prior decisions and the very purposes of allowing the class device.[10]

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[8] That the issue is allocating costs such as attorneys' fees is what distinguishes this case from those in which "the only controversy between the parties is a claim for attorney's fees." Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioner ("WLF Brief"), pp. 18-19, *citing Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990). In *Lewis*, the claim was not about "allocating such costs," but about an independent claim for appellate fees under 42 U.S.C. § 1988. Thus, WLF's reading of *Lewis* is flawed. This Court ordered that the appellate decision be vacated because "an event that mooted the controversy before the Court of Appeals' judgment issued. ." 494 U.S. at 483. However, this Court specifically observed that it was only the appeal that was mooted, and that the plaintiffs' status as "a 'prevailing party' in the district court, even though its judgment was mooted after being rendered but before the losing party could challenge its validity on appeal, is a question of some difficulty," and remanded the case for further proceedings. *Id.*

[9] In this sense, this case is distinguishable from *Genesis Healthcare*, where the plaintiff "conceded that petitioners' offer 'provided complete relief on her individual claims . . .'" 133 S. Ct. at 1532. Gomez has never conceded any such thing.

[10] That there is no statutory claim for attorneys' fees under the TCPA is of no moment to this analysis, since that is a question for the courts to decide. "Complete relief" for purposes of the mootness analysis is defined by what the plaintiff demands, not by what the defendant thinks the plaintiff is entitled to recover. *See Smith v. Greystone Alliance, LLC*, 772 F.3d 448, 451 (7th Cir. 2014) (Easterbrook, J.) ("[A] court must resolve the merits unless the defendant satisfies the plaintiff's demand. An offer that the

Roper's analysis is analogous to this Court's nominal damages jurisprudence. *Carey v. Piphus* explains that "[b]y making the deprivation of [constitutional] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed[.]" 435 U.S. 247, 266 (1978). "*Carey* obligates a court to award nominal damages when a plaintiff establishes the violation" of a constitutional right. *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). And, of course, "even an award of nominal damages suffices" to constitute "relief on the merits" and create a "material alteration of the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc. v. W.V. Dept. of Health & Human Res.*, 532 U.S. 598, 604 (2001) (quotation marks & citation omitted).

Carey and its progeny stand for the proposition that "a claim for nominal damages avoids mootness" in cases alleging a constitutional deprivation. *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 (5th Cir. 2009) (citing *Carey*); *accord, e.g., Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1257-58 (10th Cir. 2004) (same); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002) (same). That is so because "[t]he very determination that nominal damages are an appropriate remedy for a particular wrong implies a ruling that the wrong is worthy of vindication by an essentially declaratory judgment." 13A Charles Alan Wright *et al.*, FEDERAL PRACTICE & PROCEDURE § 3533.3 (2d ed. 1984). Thus "[a] valid claim for nominal damages should avoid mootness." *Id.*

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defendant or the judge believes sufficient, but which does not satisfy the plaintiff's demand, does not justify dismissal.").

So it is here. Gomez is "unlikely to obtain legal redress at an acceptable cost, unless counsel were motivated by the fee-spreading incentive and proceeded on a contingent-fee basis," *Roper*, 445 U.S. at 338 n.9, as available through the class action device. And because Gomez retains this interest notwithstanding Campbell-Ewald's offer of individual "complete relief," his claim is neither mooted by the offer, nor does Gomez lose his standing to pursue his claim on a class-wide basis.

Campbell-Ewald and its *amici* spend a great deal of time in their briefs casting aspersions on "a 'cottage industry of attorneys' responsible for a rising tide of class action suits . . turning an unwanted message into a potential for an attorney's fee or settlement bonanza." Pet. Br. at 4 (footnote omitted).[11] Given

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[11] *See also* WLF Brief at 19 n.5 ("Lawsuits like these are almost always lawyer-driven, and a desire to generate fees for Gomez's attorneys is likely what prompted this litigation in the first place"); Brief for the National Black Chamber of Commerce as *Amicus Curiae* in Support of Petitioner, p. 3 (dismissing case as one among "hypothetical disputes implicating only the interest of plaintiffs' attorneys in extracting windfall fee awards"); Brief of DRI—The Voice of the Defense Bar and PSC—The Voice of the Government Services Industry as *Amici Curiae* in Support of Petitioner, p. 3 (referring to the "attorney-fee bonanza that class counsel seek"), *id.* at 16 (describing instant suit as representing "an effort to transmogrify the individual, modest, attorney-less small claims-court proceeding into a gargantuan money-making machine for creative class-action lawyers who hope to cash-in on inadvertent mistakes made by companies trapped by the every-increasing [*sic*] challenges of complying with . . . federal privacy and financial protection statutes") (footnote and citations omitted); Brief of the Chamber of Commerce of the United States of America and Business Roundtable as *Amici Curiae* in Support of Petitioner, p. 2 (describing suit of this kind as "private lawsuits prosecuted not by plaintiffs with a personal stake in the outcome as required by Article III, but by lawyers in search of attorneys' fees"). Indeed, the Brief of the Consumer Data Industry Association

rather short shrift are the underlying allegations that drive any class-action lawsuit: wrongful conduct toward large groups of people. That point should not be lost among the *sturm und drang* directed toward attorneys specializing in class relief.

B. Campbell-Ewald's Offer Does Not Constitute "Complete Relief" for Absent Class Members.

The case was never moot because this is a "voluntary cessation" case. The injunctive relief sought below would have a continuing impact because Campbell-Ewald's offer of entry of a consent injunction (never actually entered) was little more than a promise not to violate, as to Gomez only, existing prohibitions against "spam," Resp. Br. at 29-30, leaving it free to engage in such conduct again at any time, and with no protection for absent class members. And "[i]t is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). "[I]f it did, the courts would be compelled to leave '[t]he defendant . free to return to his old ways.'" *Id.*

Informed by that prospect, a "stringent" standard is applied to determine whether a defendant's voluntary cessation moots a case: "'A case might become moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be

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as *Amicus Curiae* in Support of Petitioner is a virtual assault on "enterprising class action attorney[s]" generally. *Id.* at 14; *see also id.* at 4 (asserting factual conclusions about "Respondent's attorneys" unsupported by the record).

expected to recur.'" *Id.* (quoting *U.S. v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)) (emphasis added). The advocate for a finding of mootness must demonstrate with absolute clarity that the behavior will not reoccur. *Id.*

That burden is "heavy." *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). It is not met, for example, where a city responds to litigation by repealing an objectionable ordinance, because "the city's repeal . . would not preclude it from reenacting precisely the same provision if the . judgment were vacated." *City of Mesquite*, 455 U.S. at 289 & n.10.

Likewise, it is not met where a contractor alters its behavior after being hailed into court under similar circumstances: "The same concerns—the fear that a defendant would be 'free to return to his old ways,' and that he would have 'a powerful weapon against public law enforcement,' —dictate that we review the legality of the practice defended before the District Court." For this reason, this Court rejected a suggestion of mootness in *Hudson*, 475 U.S. at 305 n.14 (citation omitted).

Campbell-Ewald never met its "heavy" burden here, especially to the class. Indeed, Campbell-Ewald's arguments are reminiscent of those rejected in *City of Mesquite* and *W.T. Grant*. Campbell-Ewald argues that there is no reasonable probability that its conduct will recur because it was willing to enter into a "stipulation to an injunction." Pet. Br. at 7. But that sort of pious posturing does not make "absolutely clear" that the challenged conduct is a thing of the past. *Friends of the Earth*, 528 U.S. at 189. Far from it: for all that appears, Campbell-Ewald's behavior could change with the tides; it could revert to its old practices at

a moment's notice, literally with the stroke of a computer key, especially since the requested injunction has no application to the class.

Campbell-Ewald's soothing assurances thus are even less compelling than the city's repeal in *City of Mesquite*; there, at least, the city could take shelter in the presumption that government bodies act in good faith. *See Alden v. Maine*, 527 U.S. 706, 755 (1999). Campbell-Ewald is entitled to no such presumption. Its change in practices amounts merely to telling the court "that the [objectionable practices] no longer exist[] and disclaim[ing] any intention to revive them." *W.T. Grant*, 345 U.S. at 633. That does not suffice in *any* circumstance. Much less does it suffice where the defendant faces considerable economic liability and buys off prospective class representatives when hailed into court only to avoid a potential adverse ruling. As Wright & Miller observe: "A defendant's mootness argument is particularly suspect in face of abandonment of its conduct mid-trial," and "[t]he effect of discontinuance may be affected by the defendant's continued assertion that the discontinued acts are lawful." *Wright & Miller* § 3533.5.

For these reasons, Campbell-Ewald cannot demonstrate that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987) (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203) (emphasis added). The case is not moot, and was never mooted by Campbell-Ewald's offer of "complete relief" and injunction applicable only to the named plaintiff in a lawsuit seeking class-wide relief.

CONCLUSION

On the first two Questions Presented, this Court should affirm the judgment of the Ninth Circuit, and remand the case for further proceedings consistent with its decision.

Respectfully submitted,

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No. 14-857

IN THE

Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

—v.—

JOSE GOMEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* NECA-IBEW WELFARE TRUST FUND, IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of purportedly complete relief on his claim.

2. Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of purportedly complete relief before any class is certified.

RULE 29.6 STATEMENT

NECA-IBEW Welfare Trust Fund is a Taft-Hartley fund that issues no stock and is neither a subsidiary of nor otherwise controlled by any publicly traded parent corporation.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

NECA-IBEW Welfare Trust Fund is a Taft-Hartley Fund that manages a large investment portfolio for the benefit of workers, retirees, and their dependents, and that in the course of executing its fiduciary duties from time to time seeks to prosecute federal securities class actions under the Securities Act of 1933 ("Securities Act" or "1933 Act") and the Securities Exchange Act of 1934 ("Exchange Act" or "1934 Act").

In so doing, it has had occasion to refuse an offer of judgment calculated to moot its individual claims and to frustrate its efforts to act as lead plaintiff seeking relief on behalf of a class of investors.

The NECA-IBEW Welfare Trust Fund thus has an interest in the rule to be adopted by the Court in this case. With this brief the Welfare Trust Fund urges the Court not to adopt a rule such as that advanced by the Petitioner, that permits defendants to moot individual class representatives' claims with offers of judgment, thereby hobbling class actions and seriously impairing enforcement of the federal securities laws.

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[1] Pursuant to the Supreme Court Rule 37.6, counsel for *amicus curiae* NECA-IBEW Welfare Trust Fund certifies that they authored this brief in whole, and that no person or entity other than the *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Pursuant to Rule 37.3(a), all parties have consented to the brief's filings, through blanket letters of consent filed with the Clerk.

SUMMARY OF ARGUMENT

In construing Federal Rule of Civil Procedure 68 and Article III of the Constitution, this Court should consider its ruling's potential effect on class actions in general, and on private enforcement of our nation's federal securities laws in particular. For the rule advanced by Petitioner would hobble the class-action device and frustrate effective enforcement of the federal securities laws.

Congress and this Court both have long recognized the critical importance of private litigation to the enforcement of our nation's securities laws – as well as the danger posed by strike suits purportedly filed on behalf of a class, but that merely extract a payoff to the individual plaintiff.

To strengthen private enforcement of the federal securities laws, and to curtail abusive practices, Congress enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA") with detailed procedures designed to ensure optimal enforcement of the federal securities laws by putting the class member "most capable of adequately representing the interests of [the] class" or "most adequate plaintiff" in charge of any federal securities class action.[2] As set forth herein, the PSLRA specifies that a class-action complaint asserting federal securities claims must be accompanied by a certification that the plaintiff will not accept "any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro-rata share of any recovery." 15 U.S.C. §§77z-1(a)(2)(A)(vi), 78u-4(a)(2)(A)(vi). The PSLRA

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[2] *See* 15 U.S.C. §§77z-1(a), 78u-4(a) (reproduced in this brief's Appendix).

then requires public notice informing other class members of the nature of the case, and that they have 60 days in which to seek appointment as lead plaintiff in the matter. 15 U.S.C. §§77z-1(a)(3), 78u-4(a)(3). The statute next directs the district court to consider motions for appointment of lead plaintiff within 90 days after the notice's publication, and to presume that the applicant with the largest stake in the case is the "most adequate plaintiff" to represent the class. 15 U.S.C. §§77z-1(a)(3), 78u-4(a)(3). Congress sought thereby to encourage the appointment of institutional investors, such as NECA-IBEW Welfare Trust Fund, to represent the class, thereby avoiding class representatives who might put their individual interest in recovery before that of the class.

As set forth below, adopting a construction of Rule 68 that permits defendants to "pick off" lead plaintiffs with offers of judgment would severely impair the functioning of this scheme, undermining effective enforcement of the federal securities laws and reducing the public confidence in the integrity of our nation's capital markets.

There is no reason to adopt such a construction. Federal Rule of Civil Procedure 68 says "[a]n unaccepted offer is considered withdrawn," permitting the plaintiff to litigate its claims. And one who chooses to do so, and to litigate on behalf of a class, surely presents a live "case or controversy" within the meaning of Article III.

ARGUMENT

A. Private Securities Class Actions are Critical to Enforcement of the Federal Securities Laws

This Court has many times affirmed that "private actions provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to Commission action.'"[3] "The securities statutes seek to maintain public confidence in the marketplace. by deterring fraud, in part, through the availability of private securities fraud actions." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336,

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[3] *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)); *see, e.g., Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986) (defining damages rule to enhance "the deterrent value of private rights of action, which, we have emphasized, 'provide "a most effective weapon in the enforcement" of the securities laws and are a "necessary supplement to Commission action"'" (citations omitted); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 380 (1982) (reiterating "the Court's recognition in *Borak*, 377 U.S. at 432, that private enforcement of Commission rules may '[provide] a necessary supplement to Commission action'") (this Court's brackets); *Piper v. Chris-Craft Inds., Inc.*, 430 U.S. 1, 25 (1977) ("Indeed, the Court in *Borak* carefully noted that because of practical limitations upon the SEC's enforcement capabilities, '[p]rivate enforcement provides *a necessary supplement to Commission action.*'") (Court's emphasis, added in *Piper*); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975) (quoting *Borak*, 377 U.S. at 432); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 382 (1970) ("private enforcement 'provides a necessary supplement to Commission action'") (same).

345 (2005). · "This Court has long recognized that meritorious ' private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (citing *Dura*, 544 U.S. at 345, and *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

"Private securities fraud actions, however, if not adequately contained, can be employed abusively," as this Court has itself recognized. *Tellabs*, 551 U.S. at 313. At worst, individual investors can assert class claims not because they seek to benefit the class, but instead to get extra leverage only to obtain payment of their own individual claims. "As a check against abusive litigation by private parties, Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737." *Id.* (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006)); *see generally*, 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* §1806, at 423-68 (3d ed. 2005); *see also Halliburton Co. v. Erica P. John Fund Inc.*, 134 S.Ct. 2398, 2413 (2014); *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 133 S.Ct. 1184, 1200-01 (2013).

Congress gave close attention to optimal enforcement of the securities laws when it framed the PSLRA's detailed scheme for federal securities class actions. Advancing the public interest was its primary objective for, as the 1995 legislation's Conference Report reiterates, private securities class actions truly are "an indispensable tool" for investors and the nation:

> The overriding purpose of our Nation's securities laws is to protect investors and to maintain confidence in the securities markets, so that our national savings, capital formation and investment may grow for the benefit of all Americans.
>
> The private securities litigation system is too important to the integrity of American capital markets to allow this system to be undermined by those who seek to line their own pockets by bringing abusive and meritless suits. Private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action. Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs. This legislation seeks to return the securities litigation system to that high standard.

H.R. Conf. Rep. No. 104-369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 730; *see Dabit*, 547 U.S. 71 (2006) (quoting H.R. Conf. Rep. No. 104-369, at 31).

As set forth below, the rule urged by Petitioner in this case would take us away from that high standard, upending the Congressional scheme for securities class actions, and frustrating optimal enforcement of the nation's securities laws.

B. Congress' Carefully Designed Procedures for Appointment of Lead Plaintiffs to Ensure Effective Enforcement of the Nation's Securities Laws Would be Frustrated if Defendants Could "Pick Off" Representative Plaintiffs with Offers of Judgment

To control and correct perceived abuses of securities class actions, the PSLRA sets out a carefully crafted scheme for the appointment of lead plaintiffs to prosecute those actions – as the legislation's Conference Report explains in some detail. *See* H.R. Conf. Rep. No. 104-369, at 31-41; *see also* Wright & Miller, *Federal Practice & Procedure*, *supra* §1806, at 423-68. Petitioner's rule would upset that scheme.

At the case's outset, the PSLRA requires any plaintiff filing a class-action complaint to provide a sworn certification stating, among other things, "that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery." 15 U.S.C. §§77z-1(a)(2)(A)(vi), 78u-4(a)(2)(A)(vi). The only exception is that the court may award the named plaintiff "reasonable costs and expenses (including lost wages) directly relating to the representation of the class." 15 U.S.C. §§77z-1(a)(4), 78u-4(a)(4).

Permitting defendants to moot a claim by offering the named plaintiff its individual damages would frustrate the statute's rather obvious objective of ensuring that class-action complaints should *not* be filed with hopes of using the threat of class proceedings to recover a larger award for the named

plaintiff than for other class members. Petitioner asks the Court to bless such individual payoffs to named plaintiffs – with nothing going to the class that they seek (or purport) to represent.

A plaintiff whose complaint asserts federal securities claims on behalf of a class must, within 20 days of the class-action complaint's filing, publish notice, in a leading business journal or wire service, advising putative class members of the action's pendency, and that they have 60 days in which any of them may seek appointment as lead plaintiff for the class.[4] The PSLRA then requires the district court,

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[4] Parallel 1933 Act and 1934 Act provisions both state:

> **(3) Appointment of lead plaintiff**
>
> **(A) Early notice to class members**
>
> **(i)** In general. Not later than 20 days after the date on which the complaint is filed, the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class—
>
> **(I)** of the pendency of the action, the claims asserted therein, and the purported class period; and
>
> **(II)** that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.
>
> **(ii)** Multiple actions. If more than one action on behalf of a class asserting substantially the same claim or claims arising under this subchapter is filed,

within 90 days of the notice's publication, to consider whatever motions class members may file seeking appointment as lead plaintiff, "including any motion by a class member who is not individually named as a plaintiff in the complaint."[5] The statute directs that the court "shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members," whom the statute's framers designate the "most adequate plaintiff."[6] The statute further directs the district

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> only the plaintiff or plaintiffs in the first filed action shall be required to cause notice to be published in accordance with clause (i).
>
> (iii) Additional notices may be required under Federal rules. Notice required under clause (i) shall be in addition to any notice required pursuant to the Federal Rules of Civil Procedure.

15 U.S.C. §77z-1(a)(3), §78u-4(a)(3); *see* H.R. Conf. Rep. No. 104-369, at 33 ("A plaintiff filing a securities class action must, within 20 days of filing a complaint, provide notice to members of the purported class in a widely circulated business publication. This notice must identify the claims alleged in the lawsuit and the purported class period and inform potential class members that, within 60 days, they may move to serve as lead plaintiff.").

[5] 15 U.S.C. §§77z-1(a)(3)(B), 78u-4(a)(3)(B); *see* H.R. Conf. Rep. No. 104-369, at 34 ("Within 90 days of the published notice, the court must consider motions made under this section and appoint the lead plaintiff.").

[6] Parallel 1933 Act and 1934 Act provisions both state:

[continued on next page]

court to adopt a rebuttable "presumption that the

(B) Appointment of lead plaintiff

(i) In general

Not later than 90 days after the date on which a notice is published under subparagraph (A)(i), the court shall consider any motion made by a purported class member in response to the notice, including any motion by a class member who is not individually named as a plaintiff in the complaint or complaints, and shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members (hereafter in this paragraph referred to as the "most adequate plaintiff") in accordance with this subparagraph.

(ii) Consolidated actions

If more than one action on behalf of a class asserting substantially the same claim or claims arising under this subchapter has been filed, and any party has sought to consolidate those actions for pretrial purposes or for trial, the court shall not make the determination required by clause (i) until after the decision on the motion to consolidate is rendered. As soon as practicable after such decision is rendered, the court shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions in accordance with this subparagraph.

15 U.S.C. §77z-1(a)(3)(B)(i)-(ii), §78u-4(a)(3)(B)(i)-(ii).

most adequate plaintiff" is that person (or group) that "either filed the complaint or made a motion in response to a notice," which "in the determination of the court has the largest financial interest in the relief sought by the class," and "otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure."[7] Institutional investors will, of

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[7] Parallel 1933 Act and 1934 Act provisions both state:

> **(iii) Rebuttable presumption**
>
> **(I) In general**
>
> Subject to subclause (II), for purposes of clause (i), the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this subchapter is the person or group of persons that—
>
> (aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);
>
> (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
>
> (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.
>
> **(II) Rebuttal evidence**
>
> The presumption described in subclause (I) may be rebutted only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff—
>
> (aa) will not fairly and adequately protect the interests of the class; or
>
> (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

course, typically have the largest financial interest in the relief sought.

Congress' central concern, here, was to ensure that securities class actions would be led not by individuals seeking primarily to maximize their own personal recoveries, but by institutional investors best positioned to represent the interests of the entire class of investors and long-term interests of the companies in which many retain a stake. *See* H.R. Conf. Rep. No. 104-369, at 32-35. The legislation's Conference Report explains that the PSLRA

> amends the Securities Act of 1933 (the "1933 Act") by adding a new section 27 and the Securities Exchange Act of 1934 (the "1934 Act") by adding a new section 21D. These provisions are intended to encourage the most capable representatives of the plaintiff class to participate in class action litigation and to exercise supervision and control of the lawyers for the class. These provisions are intended to increase the likelihood that parties with significant holdings in issuers, whose interests are more

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> (iv) Discovery. For purposes of this subparagraph, discovery relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class.

15 U.S.C. §77z-1(a)(3)(B)(iii), 78u-4(a)(3)(B)(iii).

> strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel.

H.R. Conf. Rep. No. 104-369, at 32. Thus, the Report explains, "[t]he Conference Committee seeks to increase the likelihood that institutional investors will serve as lead plaintiffs by requiring courts to presume that the member of the purported class with the largest financial stake in the relief sought is the 'most adequate plaintiff.'" H.R. Conf. Rep. No. 104-369, at 34.

As this Court recognized in *Tellabs*, Congress sought thereby "to increase the likelihood that institutional investors – parties more likely to balance the interests of the class with the long-term interests of the company – would serve as lead plaintiffs." *Tellabs*, 551 U.S. at 321. The legislation's Conference Report explains that the statute's provisions are grounded in a conviction "that increasing the role of institutional investors will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions." H.R. Conf. Rep. No. 104-369, at 34.

Allowing defendants instead to "pick off" the most capable class representatives with offers of judgment in the midst of the lead-plaintiff appointment process would throw a monkey wrench into the legislative scheme. To permit defendants to pick off lead plaintiffs after appointment, but before a class is certified would effectively destroy it.

The opportunity for mischief should be apparent. No motion for class certification can be entertained

until after appointment of the lead plaintiff. Without doubt, the PSLRA permits a preliminary consideration of whether the lead plaintiff "otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. §77z-1(a)(3)(B)(iii)(I)(cc), §78u-4(a)(3)(B)(iii)(I)(cc). But consideration of Rule 23's factors is strictly constrained at this stage by a provision limiting rebuttal to "proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff" either "will not fairly and adequately protect the interests of the class," or "is subject to unique defenses that render such plaintiff incapable of adequately representing the class."[8] Defendants, who

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[8] Parallel 1933 Act and 1934 Act provisions both state:

> **(iii) Rebuttable presumption**
>
> **(I) In general**
>
> Subject to subclause (II), for purposes of clause (i), the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this subchapter is the person or group of persons that—
>
> (aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);
>
> (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
>
> (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.
>
> **(II) Rebuttal evidence.**
>
> The presumption described in subclause (I) may be rebutted only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff—

may later challenge class certification, lack standing to do so at this early stage. [9]

> (aa) will not fairly and adequately protect the interests of the class; or
>
> (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.
>
> **(iv) Discovery**
>
> For purposes of this subparagraph, discovery relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class.

15 U.S.C. §77z-1(a)(3)(B)(iii), (iv), §78u-4(a)(3)(B)(iii), (iv).

[9] *See* 15 U.S.C. §§77z-1(a)(3)(B)(iii)(II), 78u-4(a)(3)(B)(iii)(II) (permitting only "a member of the purported plaintiff class" to rebut the lead-plaintiff presumption); *In re Merck & Co. Sec. Litig.*, 432 F.3d 261, 266-67 (3d Cir. 2005) (noting in dictum that "the weight of authority" denies defendants standing to oppose the choice of lead counsel); *see, e.g.*, *In re USEC Sec. Litig.*, 168 F. Supp. 2d 560, 565 (D. Md. 2009); *Cal. Pub. Emps' Ret. Sys. v. Chubb Corp.*, 127 F. Supp. 2d 572, 575 n.2 (D.N.J. 2001) (most courts have denied defendants the right to challenge "the adequacy of lead plaintiffs and their chosen counsel" and citing cases); *Holley v. Kitty Hawk, Inc.*, 200 F.R.D. 275, 277 (N.D. Tex. 2001) (statute "does not provide for defendants to weigh in"); *Gluck v. CellStar Corp.*, 976 F. Supp. 542, 550 (N.D. Tex. 1997) (holding that defendants cannot challenge the appointment of a lead plaintiff); *Greebel v. FTP Software, Inc.*, 939 F. Supp. 57, 60 (D. Mass. 1996); *In re Lucent Techs., Inc., Sec. Litig.*, 194 F.R.D.

Congress thought the PSLRA's provisions important to the national interest, ensuring effective enforcement of our securities laws by securing the best representation in securities class actions. *See* H.R. Conf. Rep. 104-369, at 31-32. To permit a defendant to pick off the "most adequate plaintiff" by mooting its claims, thereby manipulating the appointment of a different lead plaintiff to prosecute the class action, would defeat Congress' plan and frustrate its aims.

This Court recognized in *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1980), that allowing defendants to "pick off" class representatives would be destructive to the class-action device. This Court explained that holding the case moot

> simply because the defendant has sought to "buy off" the individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

137, n. 17 (D.N.J. 2000); *In re Nice Sys. Sec. Litig.*, 188 F.R.D. 206, n. 11 (D.N.J. 1999); *In re Milestone Sci. Sec. Litig.*, 183 F.R.D. 404, 414-15, n. 14 (D.N.J. 1998). *But see King v. Livent*, 36 F. Supp. 2d 187, 190-91 (S.D.N.Y. 1999).

445 U.S. at 339, *aff'g Roper v. Consurve, Inc.*, 578 F.2d 1106, 1108 (5th Cir. 1978) ("defendants cannot moot the class claim by attempting to pay off the class representatives"). *Roper* considered "whether a tender to named plaintiffs in a class action of the amounts claimed in their individual capacities, followed by the entry of judgment in their favor on the basis of that tender, over their objection, moots the case," and held emphatically that it does not. *Id.* at 327; *see also* 5 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* §15:29, at 97 (2002) ("a court cannot render class claims moot by first denying class certification and then entering judgment for the plaintiffs based on the defendants' tendering an offer of judgment in the amount of the plaintiff's claims").

Allowing defendants to "pick off" claimants would, as we have shown, be utterly destructive of the PSLRA's scheme for enforcement of the federal securities laws by means of private class action. Adopting the Petitioner's position also would run counter to the policy of discouraging "strike suits," where a plaintiff seeks to coerce a settlement of its own claim by also asserting claims on behalf of a class but with no intention of prosecuting the case for the benefit of the class. "Permitting the defendants to pay off the plaintiffs" with offers of complete relief on their individual claims clearly "raises the danger of strike suits" contrary to Rule 23's underlying policies. Conte & Newberg, *supra*, §15:29, at 97. In *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 371 (1966), a shareholder derivative suit asserting 1933 Act and 1934 Act claims, this Court acknowledged that the federal rules governing class actions and shareholder suits are designed "to discourage 'strike suits.'" But Petitioner's rule would encourage them, inviting

actions filed for quick payoffs to the putative class representative.

Petitioner's rule entails extremely undesirable consequences. But nothing at all in either Rule 68 or this Court's Article III jurisprudence requires or justifies Petitioner's position that would-be class representatives may be "picked off" against their will. Rule 68 unequivocally states that an unaccepted offer of judgment "is considered withdrawn," Fed. R. Civ. P. 68(b), and a withdrawn offer cannot sensibly be deemed to moot anyone's claims. Nothing in this Court's jurisprudence suggests it should "adopt[] a rule that an individual seeking to proceed as a class representative is required to accept a tender of only his individual claims." *Roper*, 445 U.S. at 341 (Rehnquist, J., concurring). And Article III merely requires a live case or controversy, which clearly is present when an eager litigant refuses an offer of judgment in order to litigate on behalf of itself and a larger class. *See Roper*, 445 U.S. at 327; *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1970) (noting the "flexible character of Art. III mootness doctrine"); *see also Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523, 1532-37 (2013) (Kagan, J., dissenting); *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878 (7th Cir. Aug. 6, 2015).

CONCLUSION

For all the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

DATED: August 31, 2015

Respectfully submitted,

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APPENDIX

APPENDIX

Securities Act of 1933 §27, 15 U.S.C. §77z-1(a), and Securities Exchange Act of 1934 §21D, 15 U.S.C. §78u-4(a) both provide:

(a) Private class actions

(1) In general

The provisions of this subsection shall apply to each private action arising under this subchapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.

(2) Certification filed with complaint

(A) In general

Each plaintiff seeking to serve as a representative party on behalf of a class shall provide a sworn certification, which shall be personally signed by such plaintiff and filed with the complaint, that—

(i) states that the plaintiff has reviewed the complaint and authorized its filing;

(ii) states that the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel or in order to participate in any private action arising under this subchapter;

(iii) states that the plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary;

(iv) sets forth all of the transactions of the plaintiff in the security that is the subject of the complaint during the class period specified in the complaint;

(v) identifies any other action under this subchapter, filed during the 3-year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff has sought to serve, or served, as a representative party on behalf of a class; and

(vi) states that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4).

(B) Nonwaiver of attorney-client privilege

The certification filed pursuant to subparagraph (A) shall not be construed to be a waiver of the attorney-client privilege.

(3) Appointment of lead plaintiff

(A) Early notice to class members

(i) In general

Not later than 20 days after the date on which the complaint is filed, the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class—

(I) of the pendency of the action, the claims asserted therein, and the purported class period; and

(II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.

(ii) Multiple actions

If more than one action on behalf of a class asserting substantially the same claim or claims arising under this subchapter is filed, only the plaintiff or plaintiffs in the first filed action shall be required to cause notice to be published in accordance with clause (i).

(iii) Additional notices may be required under Federal rules

Notice required under clause (i) shall be in addition to any notice required pursuant to the Federal Rules of Civil Procedure.

(B) Appointment of lead plaintiff

(i) In general

Not later than 90 days after the date on which a notice is published under subparagraph (A)(i), the court shall consider any motion made by a purported class member in response to the notice, including any motion by a class member who is not individually named as a plaintiff in the complaint or complaints, and shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members (hereafter in this paragraph referred to as the "most adequate plaintiff") in accordance with this subparagraph.

(ii) Consolidated actions

If more than one action on behalf of a class asserting substantially the same claim or claims arising under this subchapter has been filed, and any party has sought to consolidate those actions for pretrial purposes or for trial, the court

shall not make the determination required by clause (i) until after the decision on the motion to consolidate is rendered. As soon as practicable after such decision is rendered, the court shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions in accordance with this subparagraph.

(iii) Rebuttable presumption

(I) In general Subject to subclause (II), for purposes of clause (i), the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this subchapter is the person or group of persons that—

(aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

(II) Rebuttal evidence

The presumption described in subclause (I) may be rebutted only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff—

(aa) will not fairly and adequately protect the interests of the class; or

(bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

(iv) Discovery

For purposes of this subparagraph, discovery relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class.

(v) Selection of lead counsel

The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.

(vi) Restrictions on professional plaintiffs

Except as the court may otherwise permit, consistent with the purposes of this section, a person may be a lead plaintiff, or an officer, director, or fiduciary of a lead plaintiff, in no more than 5 securities class actions brought as plaintiff class actions pursuant to the Federal Rules of Civil Procedure during any 3-year period.

(4) Recovery by plaintiffs

The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly

relating to the representation of the class to any representative party serving on behalf of the class.

(5) Restrictions on settlements under seal

The terms and provisions of any settlement agreement of a class action shall not be filed under seal, except that on motion of any party to the settlement, the court may order filing under seal for those portions of a settlement agreement as to which good cause is shown for such filing under seal. For purposes of this paragraph, good cause shall exist only if publication of a term or provision of a settlement agreement would cause direct and substantial harm to any party.

(6) Restrictions on payment of attorneys' fees and expenses

Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.

(7) Disclosure of settlement terms to class members

Any proposed or final settlement agreement that is published or otherwise disseminated to the class shall include each of the following statements, along with a cover page summarizing the information contained in such statements:

(A) Statement of plaintiff recovery

The amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis.

(B) Statement of potential outcome of case

(i) Agreement on amount of damages

If the settling parties agree on the average amount of damages per share that would be recoverable if the plaintiff

prevailed on each claim alleged under this subchapter, a statement concerning the average amount of such potential damages per share.

(ii) Disagreement on amount of damages

If the parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this subchapter, a statement from each settling party concerning the issue or issues on which the parties disagree.

(iii) Inadmissibility for certain purposes

A statement made in accordance with clause (i) or (ii) concerning the amount of damages shall not be admissible in any Federal or State judicial action or administrative proceeding, other than an action or proceeding arising out of such statement.

(C) Statement of attorneys' fees or costs sought

If any of the settling parties or their counsel intend to apply to the court for an award of attorneys' fees or costs from any fund established as part of the settlement, a statement indicating which parties or counsel intend to make such an application, the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought.

(D) Identification of lawyers' representatives

The name, telephone number, and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer questions from class members concerning any matter contained in any notice of settlement published or otherwise disseminated to the class.

(E) Reasons for settlement

A brief statement explaining the reasons why the parties are proposing the settlement.

(F) Other information

Such other information as may be required by the court.

(8) Attorney conflict of interest

If a plaintiff class is represented by an attorney who directly owns or otherwise has a beneficial interest in the securities that are the subject of the litigation, the court shall make a determination of whether such ownership or other interest constitutes a conflict of interest sufficient to disqualify the attorney from representing the plaintiff class.

(b) Stay of discovery; preservation of evidence

(1) In general

In any private action arising under this subchapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon the motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(2) Preservation of evidence

During the pendency of any stay of discovery pursuant to this subsection, unless otherwise ordered by the court, any party to the action with

actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

(3) Sanction for willful violation

A party aggrieved by the willful failure of an opposing party to comply with paragraph (2) may apply to the court for an order awarding appropriate sanctions.

(4) Circumvention of stay of discovery

Upon a proper showing, a court may stay discovery proceedings in any private action in a State court as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this subsection.

(c) Sanctions for abusive litigation

(1) Mandatory review by court

In any private action arising under this subchapter, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(2) Mandatory sanctions

If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall

impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(3) Presumption in favor of attorneys' fees and costs

(A) In general

Subject to subparagraphs (B) and (C), for purposes of paragraph (2), the court shall adopt a presumption that the appropriate sanction—

(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action.

(B) Rebuttal evidence

The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that—

(i) the award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden

on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) Sanctions

If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

(d) Defendant's right to written interrogatories

In any private action arising under this subchapter in which the plaintiff may recover money damages only on proof that a defendant acted with a particular state of mind, the court shall, when requested by a defendant, submit to the jury a written interrogatory on the issue of each such defendant's state of mind at the time the alleged violation occurred.

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IN THE

Supreme Court of the United States

CAMPBELL-EWALD COMPANY,
Petitioner,

v.

JOSE GOMEZ,
Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PUBLIC JUSTICE, P.C. AND AARP FOUNDATION LITIGATION, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

Petitioner Campbell-Ewald's attempt to use Rule 68 offers to moot class claims is at odds with basic notions of adequacy of representation and due process. According to Petitioner, class representatives are bound by Rule 68 offers (accepted or not), even where it effectively denies all other class members the ability to obtain any relief.

Amici are national legal advocacy groups that represent consumers and employees and advocate for robust enforcement of and remedies for violations of civil and statutory rights. Amici have a significant interest in protecting the rights of absent class members and submit this brief to explain why neither due process nor this Court's mootness jurisprudence permits Petitioner's preferred result.

Public Justice, P.C. is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. It specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the

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[1] No counsel for a party authored any part of this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Only the amici and their attorneys have paid for the filing and submission of this brief. Pursuant to Rule 37.3(a), all parties consented to the filing of this brief. A copy of that consent is on file with the Court.

preservation and improvement of the civil justice system, and the protection of the poor and the powerless. Public Justice regularly represents employees and consumers in class actions, and its experience is that the class action device is often the only meaningful way that individuals can vindicate important legal rights.

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. Legal Counsel for the Elderly (LCE), an affiliate of AARP, is the leading provider of free legal services and advocacy for vulnerable older people in the District of Columbia. LCE's primary goals are to serve and empower thousands of low-income District seniors each year in those areas of law involving "basic human needs": income, housing, long-term care, personal autonomy, and consumer protection. AARP and LCE have a substantial interest in safeguarding due process protections and preserving access to remedies through class action representation.

INTRODUCTION AND SUMMARY OF ARGUMENT

As a matter of first principles, a class representative must put absent class member interests before her own. Indeed, class actions exist to allow such a person to litigate the claims of absent class members efficiently (absent class members need not file, and the courts need not adjudicate, duplicative suits) and to ensure that substantive rights are protected even when individual damages are low. *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013) ("[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'" (citations omitted)); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("[S]mall recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))).

Petitioner would stand this paradigm on its head. Under its view of Rule 68, defendants accused of wronging millions of people could avoid accountability by repeatedly picking off the few willing to step forward. *But see Chapman v. First Index, Inc.*, No. 14-2773, ___ F. 3d ___, 2015 WL 4652878, at *1 (7th Cir. Aug. 6, 2015) (Easterbrook, J.) (holding that Rule 68 offers do *not* moot a

pending class action).[2] This would create manifest inefficiency, *contra, e.g.*, Fed. R. Civ. P 1, and effectively deprive absent class members of their ability to rely on the class mechanism to vindicate their substantive rights. There simply is no basis in law or logic for reading Rule 68 to effectively abrogate so much of Rule 23. *See, e.g., Silva v. City of Madison*, 69 F.3d 1368, 1371 (7th Cir. 1995) ("[A] single rule cannot be read in a vacuum. [It] must be read in light of the structure of the entire Rules of Civil Procedure.").

But the central problem with Petitioner's argument is not that it is illogical (though it is), nor that it is impossible to reconcile with the policies underlying Rule 23 (although it is that, too): due process simply does not allow an unaccepted offer of judgment to moot class claims. The strong due process rights of absent class members, repeatedly emphasized by this Court, cannot be traded for the interest of an individual representative plaintiff. *See, e.g., Amchem*, 521 U.S. at 625, 627.

Petitioner, however, would have this Court hold that a proposed class representative is

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[2] At least five other circuits are in accord with Judge Easterbrook's view. *See Jeffrey M. Stein, D.D.S., M.S.D., P.A. v. Buccaneers L.P.*, 772 F.3d 698 (11th Cir. 2014); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913 (5th Cir. 2008); *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004).

effectively required to accept a Rule 68 offer of judgment, enriching the proposed representative while leaving absent class members without adequate representation. Allowing defendants to use Rule 68 offers (particularly unaccepted ones) to moot class representatives' claims creates an irreconcilable conflict of interest between representative plaintiffs and the classes they purport to represent. Neither Rule 23 nor due process permits a procedural cost shifting rule to be distorted into a substantive rule that unilaterally deprives a federal court of jurisdiction over a case filed as a class action. This is particularly so given a class representative's special relationship with other class members, which stands at the heart of the class action mechanism: the proposed class representative is required to stand in the shoes of—and protect the rights of—the absent class.

Petitioner defends its illogical approach by arguing that it is compelled by this Court's mootness jurisprudence, but nothing in this Court's prior rulings permit—much less demand—such a result. To the contrary, the Court has long recognized the "flexible character of the Art. III mootness doctrine," *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1980) (quoting *Poe v. Ullman*, 367 U.S. 497, 508 (1961)), and has afforded the due process protections embedded in Rule 23 "unique significance" when applying those principals, *e.g. Sosna v. Iowa*, 419 U.S. 393, 398 (1975). This Court has thus recognized that the class plaintiff's interests are not mooted even in circumstances where an individual plaintiff's claims might be. *See Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 343-44 (1980); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975); *United Airlines, Inc. v.*

MacDonald, 432 U.S. 385, 393-95 (1977). Those cases apply with full force when a defendant tenders a Rule 68 offer prior to class certification: a representative plaintiff's ability and obligation to represent the class, and legal interest in doing so, should not be subject to unilateral destruction by a defendant's unaccepted offer of judgment.[3]

At bottom, Petitioner seeks to read Rule 68 in a manner that would severely limit the very due process rights of absent class members this Court has taken great care to protect. Amici thus respectfully urge this Court to reject Petitioner's arguments and affirm the decision of the Court of Appeals.

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[3] In Petitioner's view, a representative plaintiff's claims are mooted by any Rule 68 offer prior to class certification. Yet the due process rights of absent class members prevent the same individual from accepting that very same offer once a class has been certified. In other words, Petitioner would give defendants the power to render a proposed class representative inadequate prior to class certification simply by making a Rule 68 offer that an adequate class representative could never accept following class certification. This cannot be the law.

ARGUMENT

I. DUE PROCESS REQUIRES A CLASS ACTION PLAINTIFF TO PROVE THAT SHE WILL REPRESENT THE CLASS ADEQUATELY BY HOLDING CLASS INTERESTS ABOVE HER OWN.

This Court has long upheld the essential safeguards that operate to protect absent class members' due process rights. Of particular relevance, "the Due Process Clause requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). An absent party is thus bound to judgment only "where they are in fact adequately represented by parties who are present." *Hansberry v. Lee*, 311 U.S. 32, 43 (1940).[4] Rule 23 safeguards these fundamental constitutional principles in part by requiring a class representative to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4).

The core purpose of the Rule 23(a)(4) inquiry is to "uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625, 627. In other words, the inquiry ensures that "named plaintiffs operate[ ]

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[4] Petitioner and its Amici agree with this proposition, *see, e.g.*, Brief of the Chamber of Commerce of the United States of America and Business Roundtable as *Amici Curiae* in Support of Petitioner (July 23, 2015) at 13-17 (arguing that adequacy of representation is rooted in due process), but misconstrue its import.

under a proper understanding of their representational responsibilities" to the class. *Amchem*, 521 U.S. at 625, 627. A class representative must "possess the same interest" as the absent class members, or he is inadequate to represent them. *Id.* (quoting *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)).

The risk of a conflict between a proposed class representative and members of the class is particularly acute once offers for settlement have been made. This is so because a class representative whose "critical goal is generous immediate payments" has a conflict that "tugs against" the interest of other class members in a "fund for the future." *Amchem*, 521 U.S. at 595; *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852 (1999) ("The resulting incentive to favor the known plaintiffs in the earlier settlement was, indeed, an egregious example of the conflict noted in *Amchem* resulting from divergent interests of the presently injured and future claimants.").[5]

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[5] *See also Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 261 (2d Cir. 2001) (permitting a collateral attack on class settlement of Agent Orange litigation on grounds of inadequate representation), *aff'd in relevant part*, 539 U.S. 111 (2003); *cf.* Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 Sup. Ct. Rev. 183, 208 (2008) (noting the difficulty in securing class action settlement of mass tort claims "absent some extraordinary willingness of a settling defendant to allow some form of future claims to return to the tort system," due in large part to the

Footnote continued on next page

In sum, this Court consistently has made clear that adequacy of the class representative—an essential element of due process—hinges on the named plaintiff's ability to act in the best interests of the class. As explained below, it greatly impinges on the constitutional rights of proposed class members to allow a defendant to remove a proposed class representative unilaterally based on sharp procedural maneuvering. *Contra* 28 U.S.C. § 2072 (b) ("[The Federal Rules] shall not abridge, enlarge or modify any substantive right.").

II. CONSTRUING UNACCEPTED RULE 68 OFFERS TO MOOT A REPRESENTATIVE PLAINTIFF'S CLAIM WOULD CREATE AN INHERENT CONFLICT OF INTEREST BETWEEN CLASS REPRENTATIVES AND ABSENT CLASS MEMBERS THAT VIOLATES DUE PROCESS.

Petitioner and its amici contend that an unaccepted Rule 68 offer of complete relief moots any claims asserted by a proposed representative plaintiff as well as the class claims asserted in her

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Footnote continued from previous page

potential conflicts between class representatives and the class as identified in *Amchem*); Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L. Rev. 811, 832 (1995) ("[S]ide settlements suggest that class counsel has been laboring under an impermissible conflict of interest and that it may have preferred the interests of current clients to those of the future claimants in the settlement class.").

complaint.[6] This cannot be reconciled with the basic principles underlying adequacy of representation in the class action context, and it ignores the special status of a proposed representative plaintiff. That status is at the core of the class action mechanism: the proposed class representative represents the interests of many others who were affected by the same illegal conduct and protects the rights of those absent class members. The certification prerequisites of Rule 23(a), particularly the requirement for adequacy of representation in Rule 23(a)(4), all strive to ensure that the representative plaintiff(s) can fulfill this role.

All class representatives must be, among other things, loyal to absent class members: they are not to file potential class actions solely to make money for themselves, instead they must agree to stand for everyone else in the class. Put another way, a representative class member's interest *as a representative class member* is separate from her personal and individual economic interest: he undertakes a duty to represent the interests of the class. *See, e.g., Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989) (noting the fiduciary duty of absent class members); *Prater v. Medicredit, Inc.*, 301 F.R.D. 398, 401 (E.D. Mo.

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[6] At a minimum, the court retains jurisdiction to determine whether the offer provides complete relief and to enter a judgment. *See Chafin v. Chafin*, 133 S. Ct. 1017, 1019, 185 L. Ed. 2d 1 (2013) ("As 'long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.'" (citation omitted)).

2014) ("In a class action complaint, the named plaintiff, as the putative class representative, has a special role of assuming responsibility for the entire class of persons." (quoting *Johnson v. U.S. Bank Nat'l Ass'n*, 276 F.R.D. 330, 332 (D. Minn. 2011))).

The "divide and conquer" argument—that Rule 68 offers can be used, in effect, to force otherwise adequate class representatives to abandon the class—flies in the face of this fundamental obligation. In Petitioner's view, even if a class representative wants to do the right thing—reject an individual payday and stand for the entire class—Rule 68 strips her of that power, and the court *must* dismiss the whole case for lack of subject matter jurisdiction. It is not hard to understand why class action defendants would seek this advantage, but it cannot be reconciled with the adequacy of representation requirement underlying class actions. *See Silva*, 69 F.3d at 1371 ("[A] single rule cannot be read in a vacuum. . [It] must be read in light of the structure of the entire Rules of Civil Procedure.").

III. PETITIONER'S APPROACH LEADS TO LOGICALLY INCOHERENT RESULTS AND GIVES DEFENDANTS IMPROPER CONTROL OVER CLASS REPRESENTATION.

Petitioner's interpretation of Rule 68 should also be rejected because it leads to a logically incoherent result whereby class representatives are subject to diametrically opposed duties depending on the timing of a Rule 68 offer. It also gives defendants the ability to pick and choose who represents the class—a truly perverse outcome.

A. Petitioner's interpretation of Rule 68 is incoherent.

It is well established that due process rights of absent class members are threatened by *post-certification* settlements that disproportionately favor class representatives over other members of the class. *See, e.g.*, Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 15:27 (4th Ed. 2002) ("Normally, unless a class representative has unique claims apart from those common with the class, the named plaintiff may not obtain a preferential allocation from a lump sum class recovery but must be treated the same as all other absent members of the class."). Once a class has been certified, a class representative may not—consistent with adequacy of representation—accept a settlement offer that affords him or her preferential treatment. *See* Rule 23(e).[7]

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[7] A representative plaintiff who seeks a result beyond what he could achieve as a class member is in conflict with the class, jeopardizing the adequacy of representation. *See Franks v. Kroger Co.*, 649 F.2d 1216, 1226 (6th Cir. 1981), *reh'g*, 670 F.2d 71 (6th Cir. 1982) ("It is clear to this court that the named plaintiffs inadequately represented the interests of the other class members in negotiating the proposed settlement."); *Hooks v. General Finance Corp.*, 652 F.2d 651 (6th Cir. 1981) (per curiam) (denying class certification where proposed class representative "insisted on the maximum statutory recovery for himself rather than a pro rata share of any recovery to which the class might be entitled").

Under Petitioner's proposal, however, that very same class representative is effectively forced to accept that very same settlement offer *before* a class has been certified—even though accepting that offer ostensibly moots out the class claims entirely, leaving absent class members without any recovery at all. In Petitioner's view, a proposed class representative is beholden to a pre-certification offer that she would be duty-bound to reject post-certification.[8] It is impossible to see how this scheme comports with logic or due process.

Petitioner's suggestion that an otherwise adequate representative who "has secured complete relief occupies a fundamentally different position than putative class members," Pet. Br. at 34, misses the point. The class representative, even before certification, must not elevate her own interests above those of the class. But the inescapable import of Petitioner's view is that if the *defendant* offers the representative plaintiff a position better than any other class member, she is not only powerless to refuse it, but also instantly becomes an inadequate class representative *whether she would like to refuse it or not*. In other words, the class representative

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[8] It also encourages gamesmanship by both defendants and class action plaintiffs. *See Jeffrey M. Stein, D.D.S., M.S.D., P.A. v. Buccaneers L.P.*, 772 F.3d 698, 708 (11th Cir. 2014) (noting that treating claims differently depending on whether the Rule 68 offer is made prior to or after the class certification motion is filed "produce[s] unnecessary and premature certification motions in some cases and unnecessary gamesmanship in others.").

who would (and must) resist "opportunities for the fraudulent and collusive sacrifice of the rights of absent parties," *Hansberry*, 311 U.S. at 45, becomes incapable of representing the class because the mere offer of relief under Petitioner's interpretation of Rule 68 escalates that individual's interests above those of the class. This result would frustrate the adequacy of representation requirement that is essential to protecting the due process rights of absent class members.

B. Petitioner's interpretation of Rule 68 would allow a defendant to choose its preferred class representative.

Permitting defendants to moot class claims unilaterally through a Rule 68 offer also gives defendants an improper control over the representation of the class, both in terms of the class representative and their counsel. In particular Petitioner's approach creates an incentive for defendants to make Rule 68 offers to those plaintiffs and their counsel whom they perceive as the strongest adversaries (until a suitably agreeable plaintiff or counsel comes along to settle the case or face a perceived disadvantage).[9] Suggestions by

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[9] Professor Roger C. Cramton articulated the problem in the context of post-certification aggregate settlements:

> It is unlikely that competent, diligent, and loyal representation of the entire class will result when defendants essentially select one or several

Footnote continued on next page

Petitioner's Amici that this problem can be avoided if plaintiff's counsel simply corrals as many potential plaintiffs as possible does nothing to address this issue: a defendant could simply moot the claim of every proposed representative who was likely to be a particularly strong witness at trial.

One final point. The claim that offers of full relief will cause a "feeding frenzy of claims" and "a defendant confronted with so many claims may conclude that it would *benefit* from class certification," Brief of Chamber of Commerce at 22, should not be taken seriously. This is so because "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (emphasis in original).

* * *

Petitioner's proposal dangerously undermines the due process rights of absent class members and allows class action defendants to control class

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Footnote continued from previous page

> plaintiffs' lawyers to represent the class by expressing a willingness to negotiate with these lawyers. An adversary-system rests upon the premise that lawyers for a party are selected by that party, not by the opposing party.

Cramton, *Individualized Justice*, 80 Cornell L. Rev. at 826-27.

representation. Neither Rule 23 nor due process permits this.

IV. PETITIONER'S APPROACH IS CONTRARY TO THIS COURT'S FLEXIBLE MOOTNESS JURISPRUDENCE, WHICH INCORPORATES THE DUE PROCESS REQUIREMENTS OF ADEQUATE REPRESENTATION.

Contrary to Petitioner's contention, the due process protections essential to the class action process readily coexist with the Court's well-established jurisprudence regarding mootness. This Court has previously noted the "flexible character of the Art. III mootness doctrine" in the class action context, observing that mootness is "not a legal concept with a fixed content or susceptible of scientific verification." *Geraghty*, 445 U.S. at 400 (quoting *Poe v. Ullman*, 367 U.S. at 508 (plurality opinion)). Indeed, even setting aside that an unaccepted offer under Rule 68 should not moot an *individual* claim, *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 342 (2d Cir. 2005), it would not matter if it did.[10] This is so because the Court repeatedly

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[10] While there is a circuit split on this issue, Amici respectfully suggest that the better reasoned opinions explain that Rule 68 is not a substantive rule that can be used to strip a federal court of jurisdiction; it merely encourages settlement by shifting the burden to pay costs onto the plaintiff if an offer of settlement is greater than the relief obtained following a trial. *See, e.g.*, *McCauley*, 402 F.3d at 342; *see also* Fed. R. Civ. P. 68 advisory committee's note to 1949 amendment.

has held that federal courts retain jurisdiction over a class action even when a representative plaintiff's claims would otherwise be considered moot. *See Roper*, 445 U.S. at 343-44 (explaining that the offer of settlement without acceptance does not moot class claims to prevent plaintiffs from appealing adverse certification ruling); *Gerstein v. Pugh*, 420 U.S. at 110 n.11 (finding class claims were not rendered moot where case was capable of repetition but evading review); *Sosna v. Iowa*, 419 U.S. at 398 (holding that class certification relates back to date of original complaint where plaintiff's claim becomes moot after filing class certification ruling but before court rules). An unaccepted Rule 68 offer is not materially distinguishable from those cases.

This Court's recent decision in *Genesis Healthcare Corp. v. Symczyk* does not alter the analysis. 133 S. Ct. 1523, 1529, 1532 (2013). In *Genesis*, the issue of whether an unaccepted offer of judgment can moot a class or collective action was not before the Court. *Id.* at 1529-30. This Court held simply that *if* a plaintiff has no personal interest in the litigation, that case is moot even if the plaintiff seeks to bring a collective action. *Id.* at 1532. The Court also distinguished *Roper*, *Geraghty*, and cases like them by noting that "there are significant differences between certification under Federal Rule of Civil Procedure 23 and the joinder process under § 216(b)." *Id.* at 1529 n.1.

In sum, this Court's existing mootness jurisprudence supports Respondent's position.

CONCLUSION

At all stages of a class action, whether before or after certification, a representative plaintiff is required to uphold the interests of the absent class members above her own. A defendant's unaccepted Rule 68 offer should not be permitted to interfere with the operation of these core due process considerations. This is particularly true because Petitioner's reading of Rule 68 would effectively vitiate many of the efficiency considerations underlying Rule 23 in the first instance.

August 31, 2015

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CAMPBELL-EWALD COMPANY,
Petitioner,

v.

JOSE GOMEZ,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR TRANS UNION LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

Trans Union LLC is a "consumer reporting agency [CRA] that compiles and maintains files on consumers on a nationwide basis," as defined in Section 603(p) of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681a(p). TransUnion's diverse work force includes over 4,000 individuals, in 30 countries, on 5 different continents. At its core, TransUnion is a risk information solutions provider. As one of the nation's three nationwide CRAs (Experian Information Solutions, Inc. and Equifax Information Services, LLC are the others), it has over 30 petabytes (1 million gigabytes) of information associated with approximately one billion consumers globally. TransUnion provides tens of millions of consumer reports every month to credentialed users for an identified permissible purpose.

These items of information consist of "tradelines" from credit grantors ("tradeline" is an industry term for the current and historical activities of a particular consumer's account with a particular credit grantor), and public record items from public records sources. Each month,

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[1] No party or counsel for a party authored any part of this brief, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties have consented to the filing of this brief.

TransUnion receives over one billion updates to the items in its database. These updates come from approximately 90,000 different sources (called "furnishers"), including banks, credit card companies, mortgage companies, collection agencies, and other financial institutions. *See also Benson v. Trans Union, LLC*, 387 F. Supp. 2d 834, 841 (N.D. Ill. 2005) (noting vast scale of information received and processed by TransUnion).

This massive bank of information serves multiple private and public interests. Consumer reports are used daily by employers, individuals, financial institutions, and other commercial enterprises in making credit, personnel, life-management, hiring and other transactional decisions across all channels of commerce. *See Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004). They likewise are used by law enforcement and counter-terrorist agencies in locating suspected criminals. Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* (hereinafter "*The Impact*") at 28 (Financial Services Coordinating Council 2003). As a result, CRAs play a "vital role" in the national economy. 15 U.S.C. § 1681(a)(3).

In carrying out its diverse information-providing functions, TransUnion is comprehensively regulated by the FCRA, certain state counterparts to

the FCRA, and the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 *et seq*. The regulations under the various statutory schemes also are rigorously enforced by federal and state agencies alike. And states have *parens patriae* powers to sue under the FCRA on behalf of their citizens.

The FCRA also allows individuals to sue for a violation of any of its many provisions. Under the FCRA, successful litigants can obtain statutory penalties of up to $1,000 per violation, as well as attorneys' fees. And, just like the Telephone Consumer Protection Act at issue here, the FCRA provides for uncapped awards of statutory damages.

Over many years, the FCRA's provisions have been subject to varying interpretations by the nations' courts. Based on these decisions, the FCRA can fairly be described as a waiting trap for the unwary. Its many technical provisions are prone to differing interpretation, making compliance difficult to say the very least. To compound matters, where CRAs are concerned, an alleged violation can be replicated instantaneously and simultaneously over thousands or even millions of transactions.

These compliance difficulties, coupled with the available statutory damages and attorneys' fees, have forced TransUnion and other companies regulated under the FCRA to confront a wave of class action lawsuits. It is no exaggeration to say

that FCRA class action lawsuits have exploded in recent years. And, as TransUnion knows all too well, these lawsuits are expensive to defend and materially and deleteriously impact the cost of doing business and providing reporting services.

Once an FCRA class action is filed, there is enormous pressure to settle because of the potentially catastrophic costs associated with class-wide FCRA recoveries. Given that reality, TransUnion has a substantial interest in legal doctrines that promote the expeditious resolution of class action lawsuits. Offers of judgment made under Federal Rule of Civil Procedure 68, and the mootness principles engendered by such offers where an uncertified class is involved, provide one such avenue for efficient resolution. Indeed, Rule 68 offers have their highest utility in the FCRA class actions that threaten the greatest exposure—those seeking solely statutory damages, which are uncapped, for alleged willful violations—because the class representative's maximum recovery can be determined at the lawsuit's outset and complete relief can be promptly provided. TransUnion accordingly files this *amicus* brief urging reversal of the Ninth Circuit's decision, which deprives target defendants like TransUnion of this critical resolution tool.

In urging this Court to reinforce the efficacy of Rule 68, TransUnion hastens to add that the application of mootness principles following a

complete offer of judgment does not pave the way for a company to circumvent FCRA regulation or avoid FCRA compliance. No CRA gains anything by violating the statutory scheme, and if violations occur, they must promptly be remedied to avoid the costs associated with the FCRA lawsuits or regulatory enforcement that are certain to follow.

Nor does the application of Rule 68 mootness principles in uncertified class actions seeking statutory damages spell the end of consumer class actions under the FCRA, or anything close to it. Rule 68 mootness principles apply only in those limited circumstances where an offer of complete relief can be calculated and made, just as would be true in any other action. Class actions brought under the statute where that is not the case—for example, where actual damages are sought—are not susceptible to Rule 68.

On balance, the proper application of Rule 68's mootness principles to uncertified classes serves only to mitigate the enormous costs associated with serial class actions where there is no actual injury. The ability to contain those costs is essential to TransUnion's effective performance of its critical position in the health of the nation's economic infrastructure.

SUMMARY OF ARGUMENT

TransUnion is under siege from class lawsuits—most seeking uncapped statutory damage awards for minor and inadvertent alleged FCRA violations. In an effort to contain the escalating costs of defending these FCRA class actions, when appropriate, TransUnion relies on Federal Rule of Civil Procedure 68 and the mechanism it provides for prompt resolution of these lawsuits. Offers of judgment under Rule 68 are particularly effective in resolving FCRA suits seeking statutory damages because the claimant's potential recovery—encompassing statutorily-determined damages and attorneys' fees—can be calculated and fully paid at the outset of the dispute before further, unnecessary attorneys' fees are incurred litigating claims where the plaintiff has not suffered or sought actual damages.

The Ninth Circuit's decision below deprives companies such as TransUnion of this valuable resolution tool, and does so without a firm footing in controlling law. Nothing in Rule 68 or Federal Rule of Civil Procedure 23 or the FCRA itself purports to exempt uncertified class actions from the effect of Rule 68 offers of judgment, much less the strictures of Article III of the Constitution. Further, as explained more fully below, there are good reasons, grounded in established law, for applying Rule 68's mootness principles to uncertified FCRA class actions.

ARGUMENT

A. Consumer Reporting Agencies Like TransUnion Play A Critical Role In Our National Economy.

In December 2012, the Consumer Financial Protection Bureau reported that the three national CRAs "each maintain credit files on over 200,000,000 adults and receive information from approximately 10,000 furnishers of data." Consumer Financial Protection Bureau, *Key Dimensions and Processes in the U.S. Credit Reporting System* (hereinafter "Key Dimensions") at 3 (Dec. 2012), available at http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf.[2]

Using this compiled information, TransUnion and the other two national CRAs furnish more than 1.5 billion consumer credit reports annually. Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* at 8-9 (December

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[2] *See also Sarver*, 390 F.3d at 972 (noting that one CRA "processes over 50 million updates to trade information each day"); Staten and Cate, *The Impact*, *supra*, at 1-2 (the credit reporting system "deals in huge volumes of data – over 2 billion trade line updates, 2 million public record items, an average of 1.2 million household address changes a month, and over 200 million individual credit files").

2004) (more than 1.5 billion consumer reports furnished annually) available at http://www.ftc.gov/reports/facta/041209factarpt.pdf; *see also Key Dimensions*, *supra*, at 3 ("On a monthly basis, furnishers provide information on over 1.3 billion credit accounts or other 'trade lines'"). As Congress has acknowledged, this consumer reporting system is an "elaborate mechanism" for investigating and evaluating a consumer's credit worthiness, standing, and capacity. 15 U.S.C. § 1681(a)(2).

By performing this "elaborate" information-gathering and reporting function, as Congress itself has acknowledged, the CRAs serve a "vital role" in the national economy. *Id.* at § 1681(a)(3). Indeed, our entire "banking system is dependent upon fair and accurate credit reporting." *Id.* at § 1681(a)(1).

To underscore the point, in a hearing before the Subcommittee on Financial Institutions and Consumer Credit, Michael Staten, then Professor of Management and Director of the Credit Research Center at Georgetown University's McDonough School of Business, stated that the United States credit reporting system is the "the most robust credit reporting system in the world." *The Importance of the National Credit Reporting System to Consumers and the U.S. Economy: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the Comm. on Fin. Servs.*, 108th Cong. 2 (May 8, 2003) (statement of Michael Staten), available at http://commdocs.house.gov/committees/bank/hba908

37.000/hba90837_0.htm. As a result, he continued, the consumer and mortgage-credit markets in the United States have achieved:

> [O]ne, widespread access to credit across the age and income spectrum; two, relatively low-interest rates on secured loans, such as autos and home loans; three, exceptionally broad access to open and unsecured lines of credit, such as bank credit card-products; and four, relatively low default rates across all types of consumer loans.

Id.

As befits any business dealing with private financial information, TransUnion and other CRAs are closely and comprehensively regulated, most particularly by the detailed provisions in the FCRA. *See FTC v. TRW, Inc.*, 628 F.2d 207, 208-09 (D.C. Cir. 1980) (CRAs are "comprehensively regulated by the provisions of the FCRA"); *Islam v. Option One Mortgage Corp.*, 432 F. Supp. 2d 181, 185 (D. Mass. 2006) (noting the FCRA's "elaborate regulatory structure"). Under the FCRA, CRAs are required to establish reasonable procedures to ensure that they report, with maximum possible accuracy, consumer information only to those with a legitimate need for it. *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary*

Interpretations (hereinafter "*40 Years*") at 28 (July 2011) (providing a complete list of the duties imposed on CRAs), available at https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf.

The FCRA permits consumers to sue CRAs for the violation of "any requirement imposed under" the FCRA. 15 U.S.C. §§ 1681n(a), 1681o(a). Where a CRA has been "negligent in failing to comply with any requirement," the FCRA expressly provides for an award of "any actual damages sustained by the consumer as a result of the failure," as well as an award of attorneys' fees. *Id.* at § 1681o(a). Where a CRA is found to have "willfully" violated "any" of its statutory duties, it is liable for "actual damages" or, alternatively, "damages of not less than $100 and not more $1,000," and punitive damages, as well as attorneys' fees. *Id.* at § 1681n(a).

The FCRA authorizes administrative enforcement by both federal and state agencies. *See id.* at § 1681s. A total of eight federal agencies—including the Federal Trade Commission and the Consumer Financial Protection Bureau—have enforcement authority over the FCRA. In addition to injunctive relief, federal agencies can seek monetary payments and penalties, and states have *parens patriae* powers to bring suits on behalf of their citizens for monetary damages. *Id.* at

§§ 1681s(a)(2)(A), (c)(1)(B). Independent of the FCRA, the Consumer Financial Protection Bureau has, under the Dodd-Frank Act, extensive supervisory and additional enforcement authority over the consumer reporting industry. *See* 12 U.S.C. § 5514; 12 C.F.R. Part 1090.

State and federal governments have wielded these enforcement powers aggressively in recent years. The Federal Trade Commission "has brought over 30 actions to enforce the FCRA against CRAs, users of consumer reports, and furnishers of information to CRAs," and in 2013 announced that "[v]igorous enforcement of the FCRA is a high priority for the Commission." *The Accuracy and Completeness of Consumer Credit Reports, Prepared Statement of the Federal Trade Commission before the U.S. Sen. Comm. on Commerce, Science and Transp., Subcomm. on Consumer Protection, Product Safety, and Insurance* at 5 (May 7, 2013), available at https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-discussing-most-recent-commission-report-congress-under/130507fcra.pdf.

In addition, and again by way of example, the attorneys general of 31 states recently announced a multi-million dollar settlement of FCRA and similar state statutory claims alleged against TransUnion and other consumer reporting agencies. *See Credit Reporting Agencies Reach Settlement with State*

Attorneys general Regarding Credit Report Inaccuracies, Practical Law (June 2, 2015). The settlement includes various monitoring requirements and imposes a series of requirements on the reporting agencies to ensure compliance.

B. FCRA Class Actions Pose A Serious Threat To TransUnion And Its Peer Consumer Reporting Agencies.

Apart from state and federal enforcement actions, because of the intricacies in the regulatory scheme, TransUnion and the other national CRAs have become targets for private FCRA class actions as well. *See, e.g.*, David D. Schein & James D. Phillips, *Holding Credit Reporting Agencies Accountable: How the Financial Crisis May Be Contributing to Improving Accuracy in Credit Reporting*, 24 Loy. Consumer L. Rev. 329, 339 (2012) ("The advent of information sharing over the internet, the recent lending and mortgage crisis, and the rise in popularity and proliferation of advertisements from independent credit bureaus has led to a sharp rise in CRA litigation."); David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. Law. 931, 931 (2006) (noting the "proliferation of class action lawsuits brought under" the FCRA that, "combined with certain class action-friendly provisions of FCRA—such as the availability of fee shifting and statutory damages, and the lack of a class action damages cap—have ... push[ed] the

FCRA to the forefront of consumer financial services class litigation").

The explosion of FCRA class actions comes as no surprise. For one thing, in some jurisdictions, there is no apparent requirement that plaintiffs show any actual damages from the defendants' technical violation of the FCRA. *See, e.g., Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 718-19 (9th Cir. 2010); *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705-07 (6th Cir. 2009); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006); *but see Spokeo, Inc. v. Robins*, No. 13-1339 (U.S.) (pending) (considering "[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute"). For another, many courts will certify classes when they include some—or even many—class members who suffered no harm, and therefore would lack standing to sue had they brought the case themselves. *See, e.g., In re Nexium Antitrust Litig.*, 777 F.3d 9, 25, 31-32 (1st Cir. 2015) (affirming certification despite fact that the class consisted of thousands who were not injured); *but see Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146 (U.S.) (pending) (considering "[w]hether a class action may be certified when the class contains hundreds of members who were not injured and have no legal right to any damages").

The ease with which even "no-injury" FCRA class actions can be certified has magnified the already-serious threat those lawsuits pose to TransUnion and the consumer reporting industry. The potential class-wide liability in such suits is staggering, particularly because the FCRA lacks an express statutory cap on damage awards. *See Bateman*, 623 F.3d at 718; *Murray*, 434 F.3d at 953.[3] *Bateman* is typical of this catastrophic exposure. There, the defendant faced a $290 million liability just for including more than 5 digits of account numbers on credit card receipts—even though the complaint contained no allegation of any actual harm. *Bateman*, 623 F.3d at 710-11. Similarly, as Justices Kennedy and O'Connor noted in *Trans Union LLC v. FTC*, 536 U.S. 915 (2002), TransUnion faced a potentially "crushing" multi-billion dollar liability in an FCRA class action for violating the FTC's "nonsensical" decision to ban the disclosure of names and addresses on "target marketing lists"—and despite the fact that TransUnion was expressly permitted to disclose "detailed credit performance information, including bill payment history[,]" which

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[3] Moreover, in *Bateman* and *Murray*, the Ninth and Seventh Circuits both rejected the defendants' contentions that the possibility of "annihilating damages" in "no injury" FCRA class actions precluded class certification. *Bateman*, 623 F.3d at 718-19; *Murray*, 434 F.3d at 953-54.

disclosure was "far more invasive of consumer privacy...." *Id.* at 917 (Kennedy, J., dissenting).

As this Court and others also have acknowledged, the *in terrorem* effect of these extraordinary damage exposures provides a strong compulsion to settle even baseless claims. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (when faced with "even a small chance of a devastating loss," defendants will feel significant "pressure[]" to settle even "questionable claims"); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (expensive litigation "will push cost-conscious defendants to settle even anemic cases"); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., concurring) ("When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury."); *see also Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (aggregated statutory damages claims can produce "an *in terrorem* effect on defendants, which may induce unfair settlements"); Michael O'Neil, *Privacy and Surveillance Legal Issues, Leading Lawyers on Navigating Changes in Security Program Requirements and Helping Clients Prevent Breaches – The Transformation of the "Right to Privacy" and its Unintended Liability Consequences*, 2014 WL 10441, at *6 (Aspatore Jan. 2014) ("The impact of

federal statutes that allow the award of statutory damages for violations that cause no harm is exponentially multiplied by the class-action mechanism of Federal Rule of Civil Procedure 23.").

Cases asserting only technical violations of the FCRA—violations that cause no tangible harm to consumers—still generate the same heightened pressure to settle. *See, e.g., In re Toys R Us—Del., Inc.—Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438 (C.D. Cal. 2014) (approving class settlement that could potentially award the class $391.5 million and granting class counsel $458,602.54 in attorneys' fees even though "no putative class member had alleged any actual injury"); *Knights v. Publix Super Markets, Inc.*, No. 3:14-cv-00720 (M.D. Tenn. Nov. 12, 2014) (court approved settlement of $6.8 million to settle claim for inclusion of extraneous language on a disclosure form).

Unfortunately for TransUnion and the other national CRAs, there is no readily apparent way to shut down this threat.[4] The FCRA's myriad regulatory provisions, burdened by multiple, highly-

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[4] Nor is the threat limited to CRAs. The FCRA also strictly regulates "furnishers" of information to the CRAs, and "users"—including employers—of the reports that CRAs issue. 15 U.S.C. §§ 1681s-2(a) ("furnishers"), 1681b(f), 1681m ("users"), and 1681b(b)(2) and b(b)(3) (employers).

technical subparts—the statute contains no fewer than 31 separate sections, 145 subsections, and approximately 34,000 words—present exceedingly difficult compliance challenges.[5] This Court has noted as much, pointing out the FCRA's "less-than-pellucid" text and the "dearth of guidance" on its proper construction. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007). And, even "recklessness" is enough to satisfy the FCRA's willfulness standard for recovering statutory damages (*id.* at 68-69)—and that includes "something more than negligence but less than knowledge of the law's requirements." *Murray v. New Cingular Wireless Servs., Inc.*, 523 F.3d 719, 726 (7th Cir. 2008). Inevitably, good faith mistakes are made regarding the FCRA's requirements and, just as inevitably, class action lawsuits follow.

To protect the health of its risk-information-delivery business, TransUnion must look for ways to forestall the extraordinary costs associated with this spate of class action lawsuits. When appropriate, offers of judgment under Federal Rule of Civil Procedure 68, made to the representative of an uncertified class, provide a vehicle for just such an

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[5] *See 40 Years*, *supra*, at 28 (providing a complete list of the duties imposed on CRAs). Congress itself has acknowledged ambiguities in the FCRA since the time it was enacted. *See* 116 Cong. Rec. 36574-76 (Oct. 13, 1970).

expeditious resolution. But the utility of those offers plainly is imperiled by the Ninth Circuit's decision under review in this case.

C. Mootness Principles Engendered By Offers Of Judgment Under Rule 68 Allow Consumer Reporting Agencies To Expeditiously Resolve FCRA Class Actions.

Rule 68 provides that, "[a]t least 14 days before the date set for trial, a party defending against a claim may serve an opposing party an offer to allow judgment on specified terms, with the costs then accrued." Fed. R. Civ. P 68(a). If the offeree serves written notice accepting the offer within 14 days of being served, "either party may then file the offer and notice of acceptance," and "[t]he clerk must then enter judgment." *Id.* As an additional incentive for settlement, Rule 68 states that the offeree must pay litigation costs incurred after an unaccepted offer was made "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer." Fed. R. Civ. P. 68(d).

Thus, when defendants like TransUnion are targeted in a putative FCRA class action suit seeking only quantifiable statutory (but not actual) damages, and before any class is certified, they will extend a Rule 68 offer of judgment to compensate the named plaintiff fully for his or her individual claims, including reasonable costs or attorneys' fees as

provided for in the FCRA. In most instances, the plaintiff either rejects the offer of judgment outright or simply lets it expire.

Having made the offer, defendants move to dismiss plaintiff's individual claims on the basis of mootness because there is no longer a live case or controversy. With the proposed representative having received complete relief, the claims of the uncertified class are moot as well. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013) (holding that "[plaintiff's] suit became moot when her individual claim became moot, because she lacked any personal interest in representing others in the action" prior to the case reaching the FLSA's equivalent of class certification); *Damasco v. Clearwire Corp.*, 662 F.3d 891, 896 (7th Cir. 2011) ("To allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III."); *Pettrey v. Enterprise Title Agency, Inc.*, 584 F.3d 701, 703 n.1 (6th Cir. 2009) (settlement of class representatives' individual claims before certification mooted class claims); *Anderson v. CNH U.S. Pension Plan*, 515 F.3d 823, 826-27 (8th Cir. 2008) (class claims moot where "claims of all named plaintiffs ... were satisfied before the district court's ruling on class certification"); *Comer v. Cisneros*, 37 F.3d 775, 798 (2d Cir. 1994) ("[I]f the claims of the named

plaintiffs become moot prior to class certification, the entire action becomes moot.").

As the foregoing cases recognize, there are a number of sound reasons to bring mootness principles to bear when a bona fide offer of complete relief is made to the plaintiff in an as yet uncertified FCRA class action.

First, as petitioner's brief comprehensively explains, offers of complete relief moot individual and class claims alike under fundamental Article III "case or controversy" principles because there is no live dispute remaining. Indeed, the mooting effect of an offer of complete relief applies whether the offer is called a "Rule 68 offer of judgment" or not given a label at all. What matters is the substance of the offer, and if it provides everything the plaintiff could conceivably recover were the case to proceed to judgment—in other words, it reflects the defendant's "unconditional[ ] surrender[ ] and only [ ] plaintiff's obstinacy or madness prevents her from accepting total victory" (*Genesis Healthcare*, 133 S. Ct. at 1536 (Kagan, J., dissenting))—then the controversy is dead and there is nothing left for the court to do but enter judgment. *Chathas v. Local 134 Int'l Bhd. of Elec. Workers*, 233 F.3d 508, 512 (7th Cir. 2000) (Posner, J.) ("[I]f the defendant has thus thrown in the towel there is nothing left for the district court to do except enter judgment.").

Second, apart from Article III's jurisdictional bar, the application of mootness principles underscores that Rule 23 is a rule of procedure only; the Rule does not—and cannot—alter the result that the substantive law requires. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints"). Not only is there no legal basis for exempting class actions from otherwise applicable substantive law—the Rules Enabling Act and this Court's precedents forbid it. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (holding that the Rules Enabling Act's proscription against "interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' [barred certification] on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims") (citing 28 U.S.C. § 2072(b); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999)).

Third, the application of mootness principles in the context of an uncertified class action also serves Rule 68's core purposes. That is, Rule 68 is intended to facilitate and encourage settlement and thereby to avoid the needless expenditure of public and private resources. *Marek v. Chesny*, 473 U.S. 1, 5 (1985); *see also* Fed. R. Civ. P 68 advisory committee's note ("These provisions should serve to encourage settlements and avoid protracted litigation"); 12 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 3001 (2d ed. 2015)

("It is roundly agreed in the courts that Rule 68 was intended to encourage settlements and avoid protracted litigation[.]").

In sum, the continued vitality of Rule 68 offers of judgment in the context of uncertified class actions aligns with fundamental jurisdictional principles, established limits on the provisions of Rule 23, and judicial efficiencies. There is every reason to recognize and preserve these benefits.

D. Uncertified Class Actions Are Not, And Should Not Be, Exempted From Mootness Principles Engendered By Rule 68 Offers.

While there are sound reasons supporting the application of mootness principles engendered by Rule 68 in the context of uncertified classes, there is no basis to find that uncertified class actions—including, specifically, FCRA class actions seeking statutory damages for willful violations—should be exempted from those mootness principles.

1. There Is No Basis In Rule 23, Rule 68, Or The FCRA For Exempting Uncertified Class Actions From Mootness Principles That Follow From Rule 68 Offers.

To begin with, by its plain terms, Rule 68 operates regardless of the type of federal court action. *See* Fed. R. Civ. P 68. In particular, nothing

in the Rule suggests it does not apply, or applies more restrictively, in the context of putative class action claims. Instead, the rule refers generally to any offers made to "a party defending against a claim[.]" *Id.*; *see also* 12 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 3001.1 (2d ed. 2015) (stating that exempting class actions from Rule 68 "is inappropriate" given that there is no language in the Federal Rules limiting the application of Rule 68).

This construction is bolstered by Rules 1 and 81 of the Federal Rules of Civil Procedure. Rule 1 provides that all Rules govern "all civil actions and proceedings," except as stated in Rule 81, and Rule 81 makes no mention of excluding putative class actions under Rule 23 from the reach of Rule 68. Fed. R. Civ. P. 1; *see* Fed. R. Civ. P. 81; *see also Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1244 (10th Cir. 2011) ("[N]o express statement in the rules limits the application of rule 68 in class action complaints.") (citation and internal quotation marks omitted).

Turning next to Rule 23, there is no basis for an exemption from operative mootness principles there either. Nothing in the Rule's various subparts suggests that result. *See* Fed. R. Civ. P 23. Nor does such an exemption arise from the nature of a class action either. There is no "right" to bring a class action, *see, e.g., Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2309-10 (2013)

(reasoning that "congressional approval of Rule 23 [does not] establish an entitlement to class proceedings for the vindication of statutory rights[,]" and "there is no evidence of such an entitlement in any event"), and the dismissal or resolution of putative class claims before class certification happens as a matter of course if the substantive law provides for such a dismissal.

For example, prior to any grant of class certification, the named plaintiff is always free to accept a settlement offer in exchange for dismissing the action. *See Pettrey, Inc.*, 584 F.3d at 703 n.1; *Anderson*, 515 F.3d at 826-27. In addition, of course, a targeted defendant can move to dismiss a putative class action complaint prior to certification if the putative class representative fails to state a legally viable claim or lacks standing to sue. *See, e.g., Murr v. Midland Nat'l Life Ins. Co.*, 758 F.3d 1016 (8th Cir. 2014) (affirming summary judgment for defendant issued prior to class certification); *McNulty v. Fed. Hous. Fin. Agency*, 954 F. Supp. 2d 294 (M.D. Pa. 2013), *aff'd* (3d Cir. Mar. 18, 2014) (granting motion to dismiss for failure to state a claim prior to certification); *Zaycer v. Sturm Foods, Inc.*, 896 F. Supp. 2d 399, 409 (D. Md. 2012) (granting motion to dismiss for lack of standing and rejecting plaintiff's argument that certification is antecedent to standing). In these scenarios, the courts permit the action to be disposed of because a

class has not yet been certified and, as such, does not yet exist.

The mootness principles evoked by Rule 68 reach the same outcome through application of a different—but no less fundamental—aspect of our substantive law. And, there is no corresponding aspect of our substantive law that allows for an exception where Rule 23 is invoked but a class is not yet certified. A complaint containing class allegations holds no special immunity from prudential and substantive principles that apply to actions without those allegations.

Finally, looking at the FCRA, nowhere in its 34,000 words does it indicate that bona fide Rule 68 offers of judgment cannot operate specifically to moot a putative FCRA class action seeking statutory damages. As noted (*supra* at 10), it provides for $100-1,000 in statutory damages per class member for willful violations, plus the possibility of punitive damages and attorneys' fees. 15 U.S.C. § 1681n(a). Such an award exceeds the actual harm that most consumers experience from FCRA violations, suggesting an intent by Congress to encourage individual suits and their resolution. This statutory structure—which Congress enacted long before the explosion of consumer class litigation—does not reflect the intent to create a scheme that provides for class-wide resolution. The FCRA reflects, instead, Congress's intent to create a remedial scheme that encourages individual suits and settlements—not

aggregate litigation that multiplies damages exposure to a degree that threatens a company's very existence.

As a result, any effort to foreclose application of the mootness principles triggered by bona fide offers of judgment under Rule 68, made in the context of an uncertified class, has no grounding in Rule 68, Rule 23, or the FCRA itself. There is, in fact, no indication in any of these statutory provisions that Rule 68 should not retain its utility where an uncertified class action in concerned.

2. There Is No Compelling Reason For Exempting Uncertified FCRA Class Actions From Mootness Principles That Follow From Rule 68 Offers.

Those courts and commentators who oppose the recognition of mootness principles where bona fide Rule 68 offers are made and rejected by the named representatives of an uncertified class believe strongly in the utility of consumer class actions. Based on that strongly-held belief, they condemn the "picking off" of class representatives as an unseemly procedural gambit that contravenes Rule 23's consumer protection function. From both a legal and practical standpoint, there are a number of problems with this line of reasoning.

First, on the legal side, there is nothing untoward about the application of mootness

principles following a bona fide Rule 68 offer of judgment made to the named representative of an as-yet uncertified class. Such an offer eliminates any case or controversy and the dismissal that follows is grounded in Article III of the Constitution and the prudential conservation of public and private resources.

Nor does Rule 23, in its provisions or application, provide for any kind of fundamental right that should be elevated to negate what controlling substantive law compels. There is, as noted, no right to bring a class action and a class action does not create any rights either. On the contrary, a class action is a procedural device that must yield when our substantive law so dictates. There likewise is nothing in the language of Rule 23 suggesting it is exempt from Rule 68 or the salutary benefits that Rule 8 confers.

Second, on the practical side, applying controlling mootness principles poses no categorical threat to consumers, particularly where a reticulated statute like the FCRA is concerned. For one thing, the threat of successive FCRA class action lawsuits seeking massive damages will remain, and that is incentive enough to strive for statutory compliance. The fact that "the FCRA requires that a court award a successful plaintiff attorneys' fees[,]" however, "dispel[s] the notion that a class action is the only way" for alleged victims of violations to being vindicated. *Klotz v. TransUnion, LLC*, 246 F.R.D.

208, 217 (E.D. Pa. 2007); *see also Molina v. Roskam Baking Co.*, No. 1:09-cv-475, 2011 U.S. Dist. LEXIS 136460, *17 (W.D. Mich. Nov. 29, 2011) (noting that the FCRA's attorneys' fee provision "furnishes an adequate incentive for individual plaintiffs" to bring claims); *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 282 (4th Cir. 2010) ("There is no shortage of incentives for consumers to bring individual suits under" the FACTA amendments to the FCRA). And indeed, the threat of individual FCRA claims likewise is real. *See, e.g., In re Trans Union Corp. Privacy Litig.*, 741 F.3d 811, 814 (7th Cir. 2014) (noting the more than 70,000 individual FCRA suits filed against TransUnion in Texas state court).

Moreover, any instances of noncompliance with the FCRA that are systemic and widespread—the type of noncompliance that a class action would undoubtedly address—are likely to trigger a lawsuit by one of the many agencies charged with enforcing FCRA's regulations. State *parens patriae* lawsuits could be filed as well. 15 U.S.C. § 1681s(c)(1)(B). As noted (*supra* at 10-11), state and federal regulators have extensive powers to enforce statutes like the FCRA—and they are active in doing so.

At the same time, recognizing that Rule 68 offers can moot class claims does nothing to deter individual claimants from obtaining relief to which they are entitled. For starters, only offers of complete relief can moot a representative plaintiff's claims, so a Rule 68 offer is not available in any class

action cases where actual damages cannot be fully accounted for pre-certification. Mooting a class representative's claims pre-certification also has no preclusive effect on the claims of any other potential claimant. *Genesis Healthcare*, 133 S. Ct. at 1531 (observing that while settlement may foreclose putative plaintiffs from having their rights vindicated in the named plaintiff's suit, they "remain free to vindicate their rights in their own suits"). Those individuals remain strongly incentivized to bring their own FCRA lawsuits precisely because their costs of litigating are fully recoverable. And they also can pursue claims for injunctive relief that will serve to put an end to the allegedly offending practice for the benefit of those who elect not to sue.

Given the magnitude of the threat posed by class and individual litigation, moreover, target defendants, such as TransUnion, cannot afford to stand pat. Of course, no company sets out to violate the FCRA and expose itself to uncapped statutory liability. But where a violation is uncovered, ignoring it is not an option. On the contrary, the most cost-effective strategy a company can employ is an immediate, categorical fix to stem the threat of continuing violations.

From TransUnion's perspective, therefore, there is no compelling need to declare that uncertified consumer class actions must be exempted from the mootness principles that a bona fide Rule

68 offer would otherwise evoke. This Court should reverse the Ninth Circuit and so hold.

CONCLUSION

For the reasons discussed above, TransUnion respectfully urges this Court to reverse the judgment of the court of appeals.

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IN THE
Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amicus curiae addresses the following two questions:

1. Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim.

2. Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Procedure 23, but receives an offer of complete relief before any class is certified.

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INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a public interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.[1]

To that end, WLF has frequently appeared in this and other federal courts to urge the judiciary to abide constitutional limitations on its power to exercise subject matter and/or personal jurisdiction over parties and proceedings. *See, e.g., Spokeo, Inc. v. Robins*, No. 13-1339, *cert. granted*, 135 S. Ct.1892 (2015); *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138 (2013); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2946 (2011).

The limitations on judicial power set forth in Article III of the Constitution ensure that federal courts confine themselves to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 92 (1968). WLF does not believe that enforcement of those limitations is of diminished importance simply because the parties to litigation possessed a sufficiently adversarial relationship at the time a suit was filed. When, as here, the adversarial relationship between the parties

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

ceases to exist before the lawsuit is concluded, a federal court's jurisdiction over the proceedings also ceases to exist.

WLF is concerned that the decision below is based on a basic misunderstanding of Article III's "Cases" and "Controversies" requirement and, if affirmed, would aggrandize judicial power at the expense of the other branches of government.

STATEMENT OF THE CASE

The facts of this case are set out in detail in the brief of Petitioner. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

Respondent Jose Gomez contends that he suffered an injury when Petitioner Campbell-Ewald Co. in 2006 arranged for a third-party vendor to send him one or more unsolicited text messages urging Gomez to consider joining the U.S. Navy. Gomez contends that Campbell-Ewald's actions violated a provision of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227(b)(1)(A)(iii), which prohibits use of an automatic telephone dialing system to call a cell phone.

The TCPA provides for enforcement of the prohibition both by the Federal Communications Commission and state attorneys-general. 47 U.S.C. §§ 227(b)(2), 227(g)(1). It also creates a private right of action for individuals injured by violations of § 227(b)(1); such individuals may seek to enjoin the violations and to recover the greater of actual damages

or $500 per violation. 47 U.S.C. § 227(b)(3).[2]

In addition to seeking an award of damages for himself, Gomez sought to represent a class consisting of thousands of other individuals who allegedly received Navy-recruitment text messages at the behest of Campbell-Ewald. Complaint ¶¶ 20-27, JA-20 to JA-22. The complaint also sought an injunction requiring Campbell-Ewald "to cease all wireless spam activities" and an award of "reasonable attorneys' fees and costs." JA-23.

Before Gomez even filed a motion for class certification, Campbell-Ewald sought to end the lawsuit by giving Gomez all the relief he requested. It offered to pay him $1503 for the one Navy-recruitment text message he claimed to have received, and an additional $1503 for any other similar text message he might in good faith claim to have received.[3] It also offered to pay all reasonable costs and to stipulate to an injunction prohibiting Campbell-Ewald from engaging in the alleged wrongs. Pet. App. 38a-39a. Campbell-Ewald's January 11, 2010 offer to provide Gomez with all the relief he requested for himself took two forms: (1) a notice of offer of judgment filed with the district

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[2] If the court determines that the defendant "willfully or knowingly" violated § 227(b)(1)(A)(iii), it may at its discretion triple the amount otherwise awardable to the plaintiff. *Id.*

[3] Although the TCPA provides for statutory damages of $500 per violation, Campbell-Ewald offered $1,503 per text message, presumably in recognition of the fact that the complaint alleged that Campbell-Ewald acted "willfully" and "knowingly," and that the TCPA authorizes treble damages for willful or knowing violations.

court pursuant to Fed.R.Civ.P. 68 (the "Rule 68 Offer"); and (2) a Settlement Offer directed to counsel for Gomez. *Ibid.*

After Gomez refused to accept the proffered cash, Campbell-Ewald moved to dismiss the complaint, arguing that its offer of complete relief meant that the lawsuit no longer presented an Article III "Case" or "Controversy" and thus that the district court lacked jurisdiction to issue a ruling on the merits of Gomez's claims. The district court recognized that Campbell-Ewald had offered complete relief to Gomez. *Id.* at 40a ("The parties do not dispute that Defendant's Rule 68 Offer would have fully satisfied the individual claims asserted, or that could have been asserted."). It nonetheless denied the motion and granted Gomez's motion to strike the Rule 68 Offer. *Id.* at 40a-49a. The court later granted summary judgment to Campbell-Ewald, finding that Campbell-Ewald was immune from TCPA liability under the doctrine of derivative sovereign immunity. *Id.* at 22a-34a.

The Ninth Circuit reversed the grant of summary judgment, finding that Campbell-Ewald's status as a Navy contractor did not entitle it to share in the Navy's immunity from suit. Pet. App. 1a-21a. Before reaching the immunity issue, the appeals court considered and rejected Campbell-Ewald's contention that its offer of complete relief to Gomez rendered his claims moot and deprived the federal courts of jurisdiction to address the merits of his claims. *Id.* 4a-7a.

Although the appeals court did not contest that Campbell-Ewald offered to provide Gomez all the relief

to which he was entitled, the court held that the Rule 68 Offer did not moot his individual claims because Gomez had rejected that offer and, "An unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot." *Id.* at 5a (quoting *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 950 (9th Cir. 2013)). The court did not separately discuss the Settlement Offer or consider whether the Settlement Offer was sufficient to render the claim moot.

The appeals court also held that Gomez's putative class claims were not moot. *Id.* at 5a-7a. The court recognized that this Court recently held that when a plaintiff's individual claims become moot and no other plaintiffs have been added to his lawsuit, Article III's case-or-controversy requirement requires dismissal of the suit notwithstanding his claimed right to represent similarly situated individuals who might also wish to raise wage-and-hour claims under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* *Id.* at 6a (citing *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532 (2013)). It further conceded that *Genesis* "undermined some of the reasoning" employed by *Diaz* and other Ninth Circuit precedent on which it relied. *Ibid.* The appeals court nonetheless concluded that "because *Genesis* was not 'clearly irreconcilable'" with Ninth Circuit precedent, "this panel remains bound by circuit precedent, and Campbell-Ewald's mootness arguments [with respect to the putative class claims] must be rejected." *Id.* at 7a.

SUMMARY OF ARGUMENT

Gomez's individual claims for relief became moot once Campbell-Ewald unconditionally offered to provide him with all of his requested relief. Once that unconditional offer was made, an actual controversy between the parties ceased to exist, and the federal courts were thereby deprived of jurisdiction to issue a ruling on the merits of Gomez's claims. This Court has repeatedly explained that, for a federal court to maintain Article III jurisdiction over a matter, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997).

Campbell-Ewald's unconditional offer deprived the district court of jurisdiction to decide legal issues arising under the TCPA because the parties no longer had a personal stake in the resolution of those issues; any such decision would have been purely advisory in nature. As explained below, the district court nonetheless continued to be empowered to engage in a broad range of conduct; but after Campbell-Ewald extended its offer, Article III barred consideration of any issue touching on the merits of Gomez's TCPA claims.

The Ninth Circuit erred by focusing solely on the Rule 68 Offer to the exclusion of the Settlement Offer. Its determination that Rule 68 offers are not unconditional is not implausible; the Rule 68 Offer extended by Campbell-Ewald expressly provided that it "shall be deemed withdrawn unless written notice of acceptance is received within fourteen days of service."

Pet. App. 54a. Inclusion of that 14-day condition was consistent with the provisions of Rule 68(a) and (b). But it does not matter whether the Rule 68 Offer *by itself* moots the case. Campbell-Ewald *also* extended an unconditional Settlement Offer which, as the district court found, fully satisfied the individual claims asserted by Gomez.

Gomez asserts that the Settlement Offer is a nullity because he refused to accept the cash that Campbell-Ewald attempted to pay him. That assertion is without merit. Once Campbell-Ewald attempted to make him whole, Gomez lacked the standing necessary to maintain federal court jurisdiction over his TCPA claims. In particular, any injury-in-fact he continued to suffer was not fairly traceable to emails allegedly sent to him at the behest of Campbell-Ewald. Rather, any continuing injury was the result of his refusal to accept a check from Campbell-Ewald.

It should not matter that Campbell-Ewald never actually mailed a check to counsel for Gomez. Even if Campbell-Ewald had mailed a check, it could not have forced counsel to cash the check, any more than it could have forced counsel to place proffered dollar bills in his pocket. The salient features of the Settlement Offer were that it was unconditional and enforceable. Once that unconditional offer was extended—and brought to the attention of the district court by means of the Rule 68 Offer—Campbell-Ewald had taken all realistic steps necessary to fully satisfy Gomez's individual claims.

The Solicitor General argued in *Genesis* (as an *amicus curiae*) that once an individual claimant suffers a retrospective injury that is directly traceable to

another's alleged wrongdoing, that injury claim cannot be rendered moot unless the claimant agrees to settle the claim. While conceding that changed conditions can moot claims arising from prospective injury (such as claims for injunctive relief), the Solicitor General argued that a retrospective injury can never be erased; that a claimant is entitled to refuse offers of complete relief and instead to insist that a federal court address the merits of his claims. The Court's Article III case law has explicitly rejected that argument. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 106 (1998). Nor has the Solicitor General adequately explained why mootness doctrine should not apply to claims arising from retrospective injury to the same extent that it applies to claims arising from prospective injury.

The Ninth Circuit held alternatively that, even if Gomez's individual claims were rendered moot by Campbell-Ewald's offers, his claims for class relief should survive. Gomez concedes that he had not even filed a motion for class certification at the time that Campbell-Ewald agreed to satisfy all his individual claims. Gomez nonetheless asserts that a Case or Controversy continues to exist because if a class is certified, "the ultimate certification of the class may relate back to the filing of the complaint." Opp. Br. at 17.

Genesis considered and rejected a virtually identical argument. *Genesis* considered whether an action brought under the FLSA "remained justiciable" after the plaintiff's own claims became moot. *Genesis*, 133 S. Ct. at 1529. Even though the FLSA provides individual claimants with a statutory right to bring an

action on behalf of similarly-situated employees, the Court held, "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." *Ibid.* That reasoning is equally applicable to Gomez's claimed right to represent a nationwide class of text message recipients under Rule 23. Unless a Rule 23 class has been certified, no putative class members are parties to the suit, and thus no individual possesses the personal stake in the controversy necessary to maintain an Article III proceeding.

It is the function of the Executive Branch—not the judiciary—to "take Care that the Laws be faithfully executed." U.S. Const., Article II, § 3. The TCPA directs the FCC (with the assistance of state attorneys-general) to ensure that the provisions of the TCPA are enforced. It is the role of the judiciary, on the other hand, to decide actual "Cases" and "Controversies." Article III's narrow limits on federal court jurisdiction are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). It is not the role of the federal courts—contrary to what the Ninth Circuit apparently believes—to stretch the limits of Article III jurisdiction in order to ensure strict enforcement of the TCPA in those instances in which a defendant has mooted an existing TCPA controversy by providing complete relief to a claimant. Rather, in the absence of a continuing "Case" or "Controversy," separation-of-powers concerns require courts to leave enforcement of the TCPA in the hands of the Executive Branch.

ARGUMENT

I. GOMEZ's INDIVIDUAL CLAIMS FOR RELIEF BECAME MOOT ONCE CAMPBELL-EWALD UNCONDITIONALLY OFFERED TO PROVIDE HIM WITH ALL OF HIS REQUESTED RELIEF

On January 11, 2010, Campbell-Ewald agreed to provide Gomez all the substantive relief he requested for himself in this lawsuit, including all damages and costs and an injunction against future violations of the TCPA by Campbell-Ewald. Indeed, as the district court found, the parties "do not dispute" that Campbell-Ewald's offer "fully satisfied" all of Gomez's individual claims. Pet. App. 40a. Once that offer was made, an actual controversy ceased to exist with respect to Gomez's individual claims, thereby depriving the district court of jurisdiction to adjudicate the merits of those claims.

A. Article III Jurisdiction to Decide the Merits of a Claim Ceases Once an Actual Controversy No Longer Exists

Article III, § 2 of the Constitution confines federal courts to the decision of "Cases" or "Controversies." As the Court has repeatedly explained, "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). Both standing and mootness are aspects of the case-or-controversy requirement.

The Court has explained Article III's standing requirements as follows:

> The irreducible constitutional minimum of standing contains three requirements. . . . First, and foremost, there must be alleged (and ultimately proven) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual and imminent, not 'conjectural' or 'hypothetical.'" Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. . And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury.

Steel Co., 523 U.S. at 102-103 (citations omitted). The standing requirement ensures that the plaintiff possesses a "personal stake" in the outcome of the litigation, *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009), and that a federal court is not simply being asked to provide an advisory opinion that does not decide any actual controversy.

The mootness doctrine ensures that the requisites for maintaining federal court jurisdiction continue to exist throughout the litigation. *Arizonans for Official English*, 520 U.S. at 67 ("an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."). "If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis*, 133 S. Ct. at 1528 (quoting *Lewis v. Continental Bank Corp.*, 494

U.S. 472, 477-78 (1990)). The Court has described mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English*, 520 U.S. at 68 n.22 (citations omitted).

Importantly, a federal court's determination that it no longer possesses jurisdiction over a matter does not mean that it lacks the power to take any further actions. For example, it unquestionably has authority to issue an order declaring that it lacks jurisdiction. 13A Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction 3d* § 3536 at 535 (1984). Federal courts routinely enter consent judgments requested by the parties, even though the parties' request is a clear indication that they have settled their differences and that no actual controversy remains. The court may also entertain a request that the opposing party be made to pay costs and attorney's fees arising from the proceedings. *Willy v. Coastal Corp.*, 503 U.S. 131, 135-36 (1992).

Indeed, this Court has directed lower federal courts, when a case becomes moot, to dispose of the case in the manner "most consonant to justice in view of the nature and character of the conditions which caused the case to become moot." *U.S. Bancorp Mort. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994) (citations omitted). But Article III absolutely prohibits a federal court from addressing the merits of a plaintiff's claim following a determination that an actual controversy no longer exists. *Steel Co.*, 523 U.S. at 101-02 ("For a court to pronounce upon the meaning

or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.").

B. The Settlement Offer Was an Unconditional Offer to Provide All Requested Relief, Which Ended Any Actual Controversy Between the Parties

It is impossible to identify any actual controversy that existed between the parties after Campbell-Ewald extended its Settlement Offer on January 11, 2010. Gomez's complaint sought, in his individual capacity, an award of damages and an injunction requiring Campbell-Ewald "to cease all wireless spam activities." JA-23. The Settlement Offer unconditionally agreed to meet those demands in full:

> C-E hereby offers to pay Mr. Gomez the sum of $1503 for each and every unsolicited text message that was allegedly sent by or on behalf of C-E to any cell phone owned by Mr. Gomez or for which Mr. Gomez was the subscriber or the person responsible for payment. The complaint identifies only a single text message on May 11, 2006, and we are not aware of any other text messages sent to Mr. Gomez by or on behalf of C-E. Please identify any additional unsolicited text messages that Mr. Gomez alleges that he received on his cell phone in the "several months" following May 11, 2006, so that I may arrange for payment. C-E further agrees as part of its settlement offer to the entry of a stipulated injunction as sought in Mr. Gomez's

> complaint. Specifically, C-E will stipulate to an injunction prohibiting it from the alleged "wireless spam activities," *viz*, sending unsolicited commercial text messages to cellular telephones unless the subscriber has consented to receive such text messages or the TCPA permits such text messages to be sent.

Pet. App. 58a-59a.

The compensatory and injunctive relief offered by Campbell-Ewald fully satisfied the demands set forth in Gomez's complaint. Indeed, the district court ruled that Gomez "does not dispute" that the offer "would have fully satisfied the individual claims asserted, or that could have been asserted." *Id.* at 40a. In the absence of an actual controversy regarding the damages and injunctive relief to which Gomez is entitled, his individual claims are moot. *California v. San Pablo & T. R. Co.*, 149 U.S. 308, 313-14 (1893) (holding that "the cause of action has ceased to exist" because "[a]ny obligation of the defendant to pay to the state the sums sued for in this case has been extinguished by the offer to pay all these sums.").

A plaintiff who files a lawsuit makes a set of demands on the defendant. When the defendant responds by agreeing to meet those demands in full, he has, in effect, accepted the plaintiff's terms of settlement. Of course, if a defendant attaches conditions to his agreement, he has made a counter-offer that the plaintiff is free to reject—a rejection that would render the defendant's offer a nullity. Accordingly, in determining whether a party's offer of complete relief renders the case moot, the Court has

often focused on whether the offer is *unconditional*.

For example, in *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721 (2013), an athletic footwear company (Nike) brought a trademark infringement action against a competitor (Already), and Already filed a counterclaim contending that Nike's trademark was invalid. Nike then moved to dismiss its claims and issued a "covenant not to sue," promising not to raise any future trademark or unfair competition claims against Already. The Court held (over Already's objections) that the covenant not to sue mooted Already's invalidity counterclaim because Nike carried its burden of demonstrating that its allegedly wrongful conduct could not reasonably be expected to recur. *Id.* at 732.

In reaching that conclusion, the Court focused primarily on the "unconditional and irrevocable" nature of Nike's covenant not to sue, *id.* at 728, and Already's failure to point to any inadequacies in the covenant. *Id.* at 729. The Court noted that "Already's argument is not that the covenant could be drafted more broadly, but instead that no covenant would ever do," *id.* at 732—that is, Already argued that it should be permitted to proceed to judgment on its trademark invalidity counterclaim rather than being forced to accept an unconditional promise from Nike never to file another trademark infringement lawsuit. The Court rejected that argument and declared the case moot.

In contrast, the Court has rejected suggestions of mootness when a party's purported offer to fully satisfy the opposing party's damage claims was not unconditional. Thus, in *Knox v. Serv. Employees Int'l Union*, 132 S. Ct. 2277 (2012), the defendant sought to

moot all claims by sending out a notice to class members—after this Court granted certiorari—offering a full refund. The Court held that the defendant's offer did not moot the case because the offer was not unconditional. *Id.* at 2287-88. The Court cited evidence that notice of the refund offer included "a host of conditions, caveats, and confusions as unnecessary complications aimed at reducing the number of class members who claim a refund." *Id.* at 2287.

Campbell-Ewald's Settlement Offer is unequivocally unconditional. It does not quibble over any terms of payment; instead, it merely asks that Gomez specify how many text messages he received "so that [counsel for Campbell-Ewald] can arrange for payment" of $1503 per text message. Pet. App. 58a. By offering unconditionally and irrevocably to fully satisfy Gomez's individual claims for relief (including the payment of treble damages, which are normally available only if the plaintiff demonstrates willful misconduct), Campbell-Ewald eliminated any actual controversy between the parties and thereby rendered this case moot.

The Ninth Circuit focused on Campbell-Ewald's Rule 68 Offer. Pet. App. 4a-5a. Noting that Gomez did not accept the Rule 68 Offer, the appeals court held, "An unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot." *Id.* at 5a (quoting *Diaz*, 732 F.3d at 950). But Campbell-Ewald's mootness claims rest to a significant degree on the Settlement Offer. By failing to make any mention of the Settlement Offer, the Ninth Circuit did not even begin to come to grips with those claims.

The Rule 68 Offer contained one important condition: by its terms, it was to "be deemed withdrawn unless written notice of acceptance is received within fourteen days of service." Pet. App. 54a.[4] Gomez did not provide any written notice of acceptance, and thus the Rule 68 Offer was deemed withdrawn on January 25, 2010. Because the Rule 68 Offer attached a condition to its offer to fully satisfy Gomez's claims, one could argue the Rule 68 Offer might not *by itself* have mooted the case. But by simultaneously extending the Settlement Offer—which *unconditionally* offered to fully satisfy all of Gomez's individual claims—Campbell-Ewald entirely eliminated any actual controversy between the parties. The Rule 68 Offer served one important function: it alerted the district court that Campbell-Ewald no longer contested Gomez's claims for individual relief and thereby invited the court to enter judgment for Gomez and close the case.

Gomez notes that he has not actually received a check from Campbell-Ewald. But Campbell-Ewald has done all that it can realistically do to fully satisfy Gomez's individual claims. It offered a broadly worded injunction, and Gomez has not raised any objections to the language of the injunction. Pet. App. 60a-61a. It made clear that it will make "prompt payment" of $1503 for each text message Gomez in good faith alleges he received, *id.* at 58a-59a, and that it will also pay all of Gomez's court costs. *Id.* at 58a.

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[4] Inclusion of that condition was consistent with the terms of Rule 68(a) and (b), which state that a Rule 68 offer may be accepted at any time "within 14 days of being served" and that "[a]n unaccepted offer is considered withdrawn."

It is irrelevant that Campbell-Ewald did not take the extra step of mailing a check to counsel for Gomez. Even if Campbell-Ewald had mailed a check, it could not have forced counsel to cash the check, any more than it could have forced counsel to place proffered dollar bills in his pocket. Indeed, Gomez's counsel repeatedly made clear that he would not accept any check sent to him. The salient features of the Settlement Offer were that it was unconditional and enforceable. Once that unconditional offer was extended—and brought to the attention of the district court by means of the Rule 68 Offer—Campbell-Ewald had taken all realistic steps necessary to fully satisfy Gomez's individual claims for mootness purposes.

This Court has never indicated that a mootness determination hinges on evidence that the defendant actually sent the plaintiff a check fully satisfying the plaintiff's claims. For example, in *Knox*, the defendant (in an effort to moot the lawsuit) sent out a notice offering a full refund (the relief sought in the lawsuit) to all class members. But no checks were sent unless a class member responded to the notice by requesting a refund. Although the Court ultimately rejected the defendant's claim that the refund offer mooted the lawsuit, it never suggested that the defendant's failure to send checks cut against a mootness finding. *Knox*, 132 S. Ct. at 2287-88.

Finally, Gomez argues that the case is not moot because the complaint requests an award of attorney's fees, and Campbell-Ewald has not offered to pay any attorney's fees. But the Court held in *Lewis* that Article III's case-or-controversy requirement is not satisfied where the only controversy between the

parties is a claim for attorney's fees. *Lewis*, 494 U.S. at 480. In any event, even if this case is dismissed as moot, Gomez will be at liberty to file a motion for attorney's fees with the district court. Although a mootness determination would deprive the district court of jurisdiction to address the merits of Gomez's TCPA claims, the court would retain jurisdiction to determine whether attorney's fees are awardable for work performed during the course of the lawsuit. *Willy v. Coastal Corp.*, 503 U.S. 131 (1992); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393-98 (1990); *Citizens for a Better Environment v. Steel Co.*, 230 F.3d 923, 926-28 (7th Cir. 2000). Any claim for attorney's fees seems far-fetched in light of the absence of a fee provision in the TCPA, but Campbell-Ewald's Offer of Settlement does not preclude Gomez from asserting such a claim.[5]

C. A Plaintiff May Not Keep a Controversy Alive by Refusing to Accept Full Settlement; Any Remaining Injury Is Traceable to the Refusal, Not to the Alleged Wrongdoing

While not contesting that Campbell-Ewald's Settlement Offer would have fully satisfied his individual claims if accepted, Gomez asserts that his rejection of the offer was the end of the matter. He

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[5] Lawsuits like these are almost always lawyer-driven, and a desire to generate fees for Gomez's attorneys is likely what prompted this litigation in the first place. Counsel's desire to extend proceedings for the purpose of generating larger fees is not, of course, a reason to ignore mootness concerns.

asserts that "[t]he offer, like any other contract offer, became a nullity when rejected." Respondent Opp. Br. at 4 n.2. That contention is without merit and is directly contrary to the Court's holding in *California v. San Pablo & T.R. Co.*, 149 U.S. at 313-14.

To avoid a mootness determination, Gomez must demonstrate that he continues to satisfy the three prerequisites for an Article III "Case" or "Controversy." He must demonstrate: (1) an injury-in-fact; (2) fairly traceable to the complained-of conduct; and (3) a likelihood that the requested relief would redress his alleged injury. *Steel Co.*, 523 U.S. at 102-103. Even if one assumes that a plaintiff who has received an unconditional offer of complete relief can continue to assert injury, the plaintiff could not meet the other two requirements.

In particular, when the defendant has offered to fully satisfy the plaintiff's claims, any remaining "injury" would *not* be fairly traceable to the complained-of conduct of the defendant. Rather, such injury results from the plaintiff's refusal to accept payment from the defendant. Gomez has received an unconditional Settlement Offer that fully satisfies the demands asserted in his complaint; under those circumstances, an actual controversy no longer exists because any injury can only be fairly traced to Gomez's decision not to accept the proffered payment.[6]

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[6] Moreover, his refusal to accept proffered payments implicates the third requirement: whether his injury-in-fact would be redressed by his requested relief. All individual claims asserted (or that could have been asserted) by Gomez are fully satisfied under the terms of the Settlement Offer, yet Gomez's refusal to

In *Genesis*, the Solicitor General filed an *amicus curiae* brief urging the Court to hold that an offer to fully satisfy a plaintiff's individual claims does not moot the plaintiff's claims if it is not accepted. While conceding that changed conditions can moot claims arising from prospective injury (such as claims for injunctive relief), the Solicitor General argued that a retrospective injury can never be erased; a claimant is entitled to refuse offers of complete relief and instead to insist that a federal court address the merits of his claims. Brief for the United States in *Genesis HealthCare Corp. v. Symczyk*, No. 11-1059 (Oct. 17, 2012), at 13 n.1.

There is little to recommend the Solicitor General's suggested approach. Under that theory, if an individual makes a required payment (including any necessary interest) one day late, his creditor can claim to have been injured, refuse to accept the payment, file suit for the "unpaid" debt, and force the court to consider the merits of his breach-of-contract claim. The Government assured the Court that that type of situation would arise only infrequently because few plaintiffs who have been offered full payment would insist on a merits-based court judgment. *Genesis HealthCare Corp. v. Symczyk*, No. 11-1059, Oral Arg. Tr. at 48-51. But the issue is not the frequency with

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accept the offer suggests that the relief he requested would not redress the injury he alleges. If so, the absence of redressability provides an additional grounds to conclude that the federal courts lack jurisdiction to consider Gomez's damage claims.

which that type of situation would arise.[7] Rather, the issue is whether federal courts possess Article III jurisdiction to address the merits of claims asserted by a plaintiff who cannot demonstrate a personal stake in the resolution of the legal issues he asks the court to address. As explained above, the answer to that question is clearly, "No."[8]

The Court in at least one instance has explicitly rejected the view that changed circumstances cannot dissipate the standing of a plaintiff who has suffered retrospective injury. In *Steel Co.*, an environmental organization filed a lawsuit against a company that failed to report the presence of hazardous chemicals at its facilities, in violation of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. §11001, *et seq.* In accordance with EPCRA's citizen-suit provision, the plaintiff provided the company with 60 days' advance notice of its intent to file suit. Upon receiving the notice, the company

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[7] WLF does take issue with the United States's frequency assessment, however. If Gomez prevails in this proceeding, WLF foresees that numerous plaintiffs who are offered full payment will reject the offer for precisely the reason Gomez turned it down—they will do so based on their hopes (or their attorneys' hopes) that their cases will be certified as class actions.

[8] *Amicus* does not suggest that a plaintiff who refuses to accept an unconditional offer of complete relief should be left with nothing if the court subsequently determines that the offer has rendered the case moot. Rather, the district court could enter judgment for the plaintiff in the amount of the offer. *See, e.g., O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 575 (6th Cir. 2009). But what a district court may not do is reach the merits of the plaintiff's claims and thereby pronounce upon issues of law that it lacks jurisdiction to address.

promptly filed the overdue chemical reporting forms with the relevant agencies. By the time suit was filed, the company had come into compliance with EPCRA, but it was uncontested that the company had previously been out of compliance—and had thereby injured the plaintiff by depriving it of information about the presence of dangerous chemicals in the community.

The plaintiff sought a declaratory judgment that the defendant had violated EPCRA. The injury it sought to remedy through declaratory relief was clearly retrospective in nature. But the Court nonetheless held that the plaintiff lacked standing to seek declaratory relief because the defendant had already come into compliance with EPCRA and thereby revealed its former noncompliance, and thus declaratory relief would not redress the plaintiff's informational injury. *Steel Co.*, 523 U.S. at 106. The Court explained:

> There being no controversy over whether petitioner failed to file reports, or whether such a failure constitutes a violation, the declaratory judgment is not only worthless to respondent, it is seemingly worthless to all the world.

Id. A court's award of damages on the merits is similarly worthless to a plaintiff who has received from the defendant an unconditional offer to fully satisfy all his damage claims.

Nor has the Solicitor General adequately explained why mootness doctrine should not apply to claims arising from retrospective injury to the same

extent that it applies to claims arising from prospective injury. True, different considerations come into play when evaluating whether a claim for prospective relief has been rendered moot by changed circumstances following the commencement of the lawsuit. In such instances, a defendant that has ended its unlawful conduct during the course of litigation can establish the mootness of claims for prospective relief (*e.g.*, an injunction against future misconduct) only by "showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur." *Already*, 133 S. Ct. at 727. In contrast, the likelihood of recurrence of wrongful behavior plays no role in determining whether claims for retrospective relief have become moot.

But the same underlying principles guide mootness determinations with respect to claims both for prospective relief and for retrospective relief: a case is moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Id.* at 726. As the Court explained in determining that a plaintiff's claims for prospective relief (an injunction requiring a law school to admit him as a student and allow him to graduate) were moot because he was nearing graduation:

> A determination by this Court of the legal issues tendered by the parties is no longer necessary to compel [graduation] and could not serve to prevent it. The controversy between the parties has thus clearly ceased to be "definite and concrete" and no longer "touch[es] the legal relations of parties having adverse legal interests."

DeFunis v. Odegaard, 416 U.S. 312, 317 (1974) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)). Those factors are as applicable to claims for retrospective relief as they are to claims for prospective relief. They serve to underscore why the absence of an actual controversy between Gomez and Campbell-Ewald renders this case moot and bars the district court from addressing the merits of Gomez's TCPA claims.

II. GOMEZ's PUTATIVE CLASS CLAIMS ARE ALSO MOOT IN THE ABSENCE OF A CERTIFIED RULE 23 CLASS

The Ninth Circuit held alternatively that, even if Gomez's individual claims were rendered moot by Campbell-Ewald's offers, his claims for class relief should survive. Gomez concedes that he had not even filed a motion for class certification at the time that Campbell-Ewald agreed to satisfy all his individual claims. Gomez nonetheless asserts that a Case or Controversy continues to exist because, if a class is certified, "the ultimate certification of the class may relate back to the filing of the complaint." Opp. Br. at 17.

Campbell-Ewald's opening brief cogently explains why Gomez's claims for class relief are moot. WLF will not repeat those arguments here. We nonetheless wish to emphasize several points.

First, Gomez's arguments regarding why its claims for class relief should survive were addressed and rejected in *Genesis*. That case considered whether an action brought under the FLSA "remained

justiciable" after the plaintiff's own claims became moot. *Genesis*, 133 S. Ct. at 1529. Even though the FLSA provides individual claimants with a statutory right to bring an action on behalf of similarly-situated employees, the Court held, "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." *Ibid.*

That reasoning is equally applicable to Gomez's claimed right to represent a nationwide class of text message recipients under Rule 23. Unless a Rule 23 class has been certified, no putative class members are parties to the suit, and thus no individual possesses the personal stake in the controversy necessary to maintain an Article III proceeding. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1980), suggests that Gomez might have had a plausible basis for resisting mootness if the district court had considered and denied a motion for class certification prior to Campbell-Ewald's Settlement Offer. But when Campbell-Ewald submitted its unconditional offer to Gomez in 2010, Gomez had not yet even filed a motion for class certification.

Second, the Solicitor General's brief in *Genesis* strongly supports Campbell-Ewald's position regarding the mootness of Gomez's class claims. U.S. Br. at 25-33. In response to the claim of the plaintiff in *Genesis* that the case could remain "live" on the basis of her assertion that she was entitled to represent fellow employees in a collective action, the Solicitor General disagreed, stating, "If no additional plaintiffs opt in before the named plaintiff's personal claim expires, then without more the action will have already lost its

live status." *Id.* at 29. The Solicitor General's analysis regarding the mootness of an FLSA collective action into which no additional plaintiff has opted applies equally to a putative class action in which a Rule 23 motion for class certification has not been granted.

Finally, the important role that the case-or-controversy requirement plays in ensuring separation of powers among the three branches of government cannot be overemphasized. The requirement "ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes." *Genesis*, 133 S. Ct. at 1528. It is "a crucial and inseparable element" of the separation-of-powers principles embedded in the Constitution, "which successively describe where the legislative, executive, and judicial powers, respectively, shall reside." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881-82 (1983).

It is the function of the Executive Branch—not the judiciary—to "take Care that the Laws be faithfully executed." U.S. Const., Article II, § 3. The TCPA directs the FCC (with the assistance of state attorneys-general) to ensure that the provisions of the TCPA are enforced. 47 U.S.C. §§ 227(b)(2), 227(g)(1). It is the role of the judiciary, on the other hand, to decide actual "Cases" and "Controversies." Article III's narrow limits on federal court jurisdiction are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). It is not the role of the federal courts—contrary to what the Ninth Circuit apparently believes—to stretch the limits of Article III jurisdiction

in order to ensure strict enforcement of the TCPA in those instances in which a defendant has mooted an existing TCPA controversy by providing complete relief to a claimant.[9] Rather, in the absence of a continuing "Case" or "Controversy," separation-of-powers concerns require courts to leave additional enforcement of the TCPA in the hands of the Executive Branch.

Gomez asserts that Rule 23 grants him rights to assert claims on behalf of similarly situated consumers.[10] But the Federal Rules of Civil Procedure cannot authorize the federal courts to exercise powers that Article III of the Constitution prohibits them from exercising. As the Court has explained:

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[9] In light of the "cottage industry of attorneys" responsible for "a rising tide of class action suits under the TCPA," Pet. Br. at 4, there is little danger that the ability of consumers to vindicate their rights under the TCPA will be threatened by the occasional case in which a defendant "picks off" a potential class representative by paying his claim in full before he can move for class certification. But even if that danger were real, Congress and the FCC (not the courts) are the appropriate bodies to assess such concerns and to consider any appropriate responses (such as altering the amount of statutory damages available).

[10] WLF notes, in passing, that there is a serious question whether Gomez could ever effectively represent the interests of absent class members in a Rule 23 class. Presumably, the vast majority of class members would be pleased to accept a defendant's offer to fully satisfy their TCPA claims. Gomez's rejection of the unconditional Settlement Offer suggests that he is willing to subordinate his interests in complete recovery to other litigation-related interests, such as higher attorney's fees. A class member whose interests thus diverge so significantly from those of other class members is a far-from-ideal class representative.

> [F]ederal courts, in adopting rules, [are] not free to extend or restrict the jurisdiction conferred by a statute. . Such a caveat applies *a fortiori* to any effort to extend by rule the judicial powers of the United States described in Article III of the Constitution. The Rules, then, must be deemed to apply only if their application will not impermissibly expand the judicial authority conferred by Article III.

Willy, 503 U.S. at 135.

CONCLUSION

Amicus curiae Washington Legal Foundation requests that the Court reverse the decision of the court of appeals.

Respectfully submitted,

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